Supreme Court, U.S.
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No. 09-820

In The

Supreme Court of the United States

MARY D. SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation, and
THE LUMMI NATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As a matter of federal law, the boundary on navigable waters between uplands and tidelands is ambulatory in nature. Upland owners have a common law right to build shore defense structures on their property to protect against erosion.

Section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA) prohibits the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." It also makes it unlawful to "build or commence the building of any . . . structures in", or "to excavate or fill, or in any manner to alter or modify," navigable waters of the United States without a permit from the Army Corps of Engineers.

Submerged lands underlying navigable waters within territories of the United States are presumed to be held by the United States in trust for future states, which generally acquire such lands by virtue of their sovereignty upon achieving statehood. Nevertheless, Congress may withhold specific submerged lands from a future state by using plain language demonstrating intent to withhold them.

The questions presented are:

1. As a matter of federal law, when owners of real property abutting navigable waters lawfully erect a shore defense structure on their own uplands, does the shore defense structure constitute a trespass

QUESTIONS PRESENTED FOR REVIEW – Continued

against the tideland owner if subsequent erosion causes the mean high water line to contact the seaward face of that shore defense structure?

2. As a matter of federal law, does an owner of tidelands underlying navigable waters have a vested right to the unabated erosion of abutting uplands as they would exist in their natural state – a right that is superior to the upland owner's right to erect shore defense structures?

3. Is an owner of upland property strictly liable under Section 10 of the RHA for erecting a shore defense structure without a federal permit when, at the time of its original construction, the shore defense structure was erected entirely out of navigable waters of the United States?

4. Is injunctive relief under the RHA exempt from the general requirement that courts balance competing equitable interests before issuing an injunction?

5. Is the general disclaimer in the Washington Enabling Act that disclaims title to "all lands lying within [the state] owned or held by an Indian or Indian tribes" sufficient to demonstrate the requisite Congressional intent to overcome the presumption that tidelands are held in trust for the State of Washington?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties in the Court below include Keith and Shirley A. Milner, Ian Bennett and Marcia Boyd, Brent and Mary K. Nicholson, Harry Case, Donald and Gloria Walker and petitioner here, Mary D. Sharp.

Respondents, the United States and the Lummi Indian Nation, were plaintiff and intervenor-plaintiff, respectively, in the proceeding below.

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OPINIONS BELOW

The opinion below was issued by the United States Court of Appeals for the Ninth Circuit. It is reported as *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009) and is reprinted beginning at Appendix (App.) 1. The panel upheld a series of unreported summary judgment orders of the United States District Court for the Western District of Washington that were entered on various dates, and are reprinted beginning at App. 46.

JURISDICTION

The Court of Appeals' decision was issued on October 9, 2009. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case concerns the interpretation and application of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 *et seq.* (RHA). Relevant provisions of the RHA are reprinted beginning at App. 109.

INTRODUCTION

This petition presents issues of enormous importance regarding property ownership along the Nations' navigable waters that call for resolution by this Court. Petitioner Mary D. Sharp owns waterfront property within the Lummi Indian Reservation in Whatcom County, Washington. She and her husband (Homeowners)[1] own a home with a typical shore defense structure to protect against erosion, specifically a wooden bulkhead and riprap. The federal government joined with the Lummi Indian Nation to sue her for trespass because, even though the shore defense structure was originally erected on her own land, the beach between her structure and the tideland boundary subsequently eroded away. Instead of intersecting the beach, that boundary, the mean high water line, now intermittently intersects a portion of her shore defense structure.

The Ninth Circuit Court of Appeals ruled against Homeowners on three issues affecting owners of properties adjoining navigable waters, all of which create significant uncertainties unless resolved by this Court.

First, the Ninth Circuit ruled as a matter of federal property law that the owner of tidelands underlying navigable waters has a vested right to the

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[1] To provide consistency with the Ninth Circuit's reference to "Homeowners" this petition will refer to Mrs. Sharp and her husband as "Homeowners," even though she is the sole owner.

erosion of abutting uplands as they would exist in their natural state, and that this vested right supercedes the upland owner's right to erect shore defense structures to protect against erosion. This ruling places every owner of our Nation's waterfront developments at risk of future disputes with the owner of the adjacent submerged lands.

Second, the Ninth Circuit rearranged the text of Section 10 of the RHA to create an equally disruptive regulatory rule – that owners of property abutting navigable waters can be liable for erecting a shore defense structure without a federal permit even though, **at the time of its construction**, the shore defense structure was erected entirely out of navigable waters, and therefore, did not require a federal permit. The Ninth and Third Circuits are divided on the question whether Section 10 of the RHA imposes strict liability in light of its potential criminal penalties. Given the far-reaching scope of the RHA, this Court should resolve these issues.

Similarly, the Ninth Circuit held that courts should not balance the equities in deciding whether an injunction should issue under the RHA. The injunction here compels Homeowners to perpetually remove any part of their shore defense structure that intersects the boundary of the navigable water. Although this Court announced a contrary rule regarding injunctions under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA) in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), this Court has not addressed the issue in the context of the RHA. Given

the similarly vast reach of regulatory power under the RHA, this Court should resolve this issue.

In light of the historic and widespread occurrence of shore defense structures, increasing trends in the general prevalence of erosion, and the prospects of rising sea levels, the Court should resolve these specific questions affecting the respective rights and responsibilities of owners of property abutting navigable waters and regulation under the RHA.

The pervasive impact of the Ninth Circuit's decision has not gone unnoticed. *See* David M. Ivester, *The Boundary of Navigable Waters and the Tidelands May Extend Behind Lawfully Built Shore Defense Structures as if They Do Not Exist*, 19 CALIFORNIA LAND USE REPORTER 99 (2010). This petition respectfully requests the Court to resolve the questions presented so as to avoid the widespread consequences of the Ninth Circuit's opinion – uncertainty on issues as significant as property ownership and the regulatory mandates of the RHA. *Id.* at 103.

Finally, the Ninth Circuit ruled that a commonplace generic disclaimer in the Washington Enabling Act, Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, that disclaims title to "all lands lying within [the state] owned or held by an Indian or Indian tribes" precluded the State of Washington from acquiring title to specific tidelands upon statehood. No court has ever so ruled. This issue presents a fundamental question regarding the respective powers of two branches of federal government and the presumed

right of a state to ownership of tidelands upon statehood.

STATEMENT OF THE CASE

A. Overview

This case arises from the existence of a "shore defense structure," which protects Homeowners' residence from erosion. Here, the term "shore defense structure" refers to a bulkhead and riprap (essentially, large boulders), although in other contexts, similar structures are often referred to as seawalls, revetments, dikes, levees or embankments, among others.

Homeowners' property borders the Strait of Georgia, connected to Puget Sound and the Pacific Ocean through the Strait of Juan de Fuca. The property lies in an area known as Sandy Point, located within the boundaries of the Lummi Indian Reservation in Whatcom County, Washington.

Mrs. Sharp purchased their Sandy Point home in 1980. In 1977, her predecessor in interest built a wooden retaining wall to level the building site and protect against erosion, that functions as a bulkhead. The wall is embedded into the ground to provide stability.

After a major storm in 1982, Homeowners added riprap, essentially boulders ranging from one to four feet in diameter, to the seaward side of the wooden

retaining wall. Riprap provides additional stability to the bulkhead and the jagged face of the riprap dissipates the force of waves during storm surges and reflects waves in an asymmetrical manner, thereby reducing the erosion of sand and gravel on the seaward side of the structure. In 1993, Homeowners added riprap on top of the existing riprap.

The bulkhead, riprap, and additions thereto were originally erected entirely on the uplands, that is, landward of where the Mean High Water (MHW) line intersects the beach. The line where the elevation of MHW intersects the land is the property boundary between upland and tidelands. App. 98-100. However, the beach that existed at the time of construction between Homeowners' structure and the MHW line has eroded to some extent. Now, the MHW elevation, at times, intersects the riprap instead of the beach.

It should be understood that the beach rises and falls on a seasonal and daily basis due to the tidal deposition of sand and gravel during the summer months and erosion of the same during the winter months. *See generally* App. 7, n.3. As a result, MHW intersects Homeowners' riprap during some periods and not during others.

The Lummi Indian Nation (Lummi Nation) claims beneficial ownership of the tidelands. It asserts that, if MHW intersects a shore defense structure, the property line permeates or projects through the structure instead of stopping at the seaward face of the structure. The federal government agrees, and

instituted this action against the Homeowners on behalf of the Lummi Nation.[2]

The federal government's complaint alleged trespass by Homeowners' "shore defense structure" on tidelands held in trust for the Lummi Nation. The complaint also alleged violations of the RHA and the CWA and sought injunctive relief. The Lummi subsequently intervened, alleging only claims for trespass.

Homeowners contend that they cannot be liable for trespass against the United States or the Lummi Nation because their shore defense structure was originally built on their own land. Specifically, Homeowners assert that they cannot be in violation of the RHA for failing to obtain a federal permit because, at the time of its original construction, the shore defense structure was erected entirely out of navigable waters of the United States, thereby obviating the need for a federal permit. Finally, Homeowners contend they are not liable for trespass because, under the equal footing doctrine, the State of Washington is the owner of the tidelands.

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[2] Before filing suit, the U.S. Attorney contacted seven sets of landowners about allegations of trespass on the Lummi Nation's tidelands. The suit was brought against the owners of six properties – the one which was not sued was then acting as the CEO of the Lummi Nation.

B. Facts Regarding Tideland Ownership

In 1855, the Government executed the Treaty of Point Elliott[3] (Treaty) with several Western Washington tribes, including the Lummi. The Treaty expressly relinquished all aboriginal title to land. The Treaty also established special reservations for the tribes, and provided for the possibility of relocating all tribes to a general reservation.

The reservation at which the Lummi were located comprised only of the "island of Chah-choo-sen" in the Lummi River, which does not include Sandy Point. In 1873, President Grant, by Executive Order, expanded the reservation to include Sandy Point and extended all reservation boundaries to "low water." "Low water" has been interpreted to include tidelands. At issue in this case is whether the President was authorized to, and intended to, permanently reserve Sandy Point tidelands, thereby defeating the presumptive transfer of tidelands to Washington upon statehood.

The only action of Congress referenced by the Ninth Circuit is the Washington Enabling Act, 25 Stat. at 677, which required the new State of Washington to disclaim title to all "lands lying within [the state] owned or held by any Indian or Indian tribes." *Id.* Homeowners contend that this is

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[3] Treaty Between the United States and the Duwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (1859).

insufficient to constitute the requisite Congressional intent to defeat presumptive state title to tidelands upon statehood.

C. The District Court Decisions

District Court Judge Barbara Rothstein resolved all of the issues in a series of summary judgment motions. The Court rejected Homeowners' argument that the tidelands were owned by the State of Washington and not the federal Government. App. 78-79. Similarly, the Court rejected Homeowners' position that they could construct shore defense structures on their own uplands to prevent erosion and thereby keep the MHW line from moving landward. App. 64, *et seq.*

The Court also ruled on partial summary judgment that Homeowners' shore defense structure trespassed, App. 52-56, and violated the RHA's permitting requirements, even though it is undisputed that no permit was required at the time the structure was originally built or enlarged. App. 56-58.

Judge Rothstein ordered Homeowners to remove the portion of their structure that subsequently intersected MHW, as it would have existed in its natural state but for the shore defense structure and to perpetually move such structures if MHW continues to shift further landward. App. 62-63. The CWA claim was voluntarily dismissed by the federal Government.

D. The Ninth Circuit Decision

Homeowners' appeal to the Ninth Circuit provided no relief. The Court concluded that the State of Washington did not obtain the tidelands upon statehood, App. 18, that the Homeowners' shore defense structure constituted a trespass because the Lummi Nation had a vested right to the erosion of Homeowners' property, App. 22, and that Homeowners violated the RHA because their shore defense structure currently existed in navigable waters without a federal permit, even though the structure was originally constructed entirely out of navigable waters, thereby obviating the need for a federal permit. App. 36.

In several places of its opinion, the Ninth Circuit criticizes the Homeowners for failing to reach a settlement with the Lummi Nation, a criticism that should have no bearing on judicial resolution of any dispute.[4] App. 44; *see also* App. 28.

This outrageous criticism of Homeowners is based on an inaccurate assumption of an unwillingness to settle. Homeowners have always been willing

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[4] The Ninth Circuit also noted that an organization of homeowners agreed to lease the tidelands pursuant to a 25-year lease that ended in 1988. App. 6, 15. Although the Ninth Circuit's opinion might lead one to conclude otherwise, this association did not include Homeowners in this case. Rather, its members owned properties located elsewhere at Sandy Point, but not bordering the tidelands adjoining Homeowners' properties.

to settle, just not on the unreasonable terms demanded by the Lummi Nation, which uses the full litigation and regulatory power of the federal government and the potential destruction of Homeowners' residence as leverage.[5]

Finally, the Ninth Circuit recognized that the Government's RHA claim was not really based on the purposes of the RHA in protecting navigation in the Nation's waters.

> [T]he United States indicated that its concerns would be satisfied if the Homeowners entered into agreements with the Lummi.

App. 44. In essence, the federal government's RHA claim is simply to pressure the Homeowners to succumb to the demands of the Lummi Nation.

Homeowners find themselves in the most unenviable position – defending themselves against the federal government which has joined with a separate entity claiming sovereign nation status, defending on issues pertaining to state and national sovereignty, the nation's waters, and the regulatory power of the

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[5] If there is a trespass, Homeowners have always been willing to pay the tideland owner for the fair market rental value of any land upon which they might be trespassing. Potential settlement with the Lummi Nation, however, is necessarily limited by its demands. Homeowners' willingness to pay the tideland owners the fair market rental value underlies their argument that the State is the owner of the tidelands. Washington State has a well-established system for leasing tidelands based on fair market value. *See* Wash. Rev. Code § 79.125.400.

federal government. Homeowners urge the Court to grant the petition in this case for the reasons addressed below.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit has decided an important question of federal property law which has not been, but should be, settled by this Court regarding property ownership with waterfront boundaries.

The Ninth Circuit decided that the Homeowners are trespassing because a portion of their shore defense structure is located in an area where the tideland boundary intersects the structure.[6] Rather than accepting the Homeowners' argument that the boundary between uplands and tidelands is where the elevation of MHW intersects the beach or any

[6] The Ninth Circuit decided these were matters of federal law because this was an action for trespass on lands owned by Indians. App. 10. Because one of the questions in this case is whether the tidelands are in fact owned for the Lummi Nation, a more accurate conclusion is that federal law applies because federal law is the proper choice when ruling upon competing rights between the United States and others on navigable waters. *See California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 280, 283 (1982).

Federal law is also the applicable law when dealing with the competing rights of a citizen and his own state on land bordered by navigable waters. *See Hughes v. State of Washington*, 389 U.S. 290 (1967).

lawfully placed structure, the Ninth Circuit ruled that structures designed to prevent erosion cannot stop the property line from moving.

This is a remarkable ruling that will have dramatic impacts along the coastline. Under the Ninth Circuit's new rule that tideland owners have a right to future erosion (App. 26-27), waterfront property boundaries must be where MHW would otherwise intersect the ground if the ground or beach were left in its natural state. Lawfully built structures on one's own land, essentially fixtures to the land itself,[7] must be ignored and the boundary line will be relocated to wherever the MHW elevation would have intersected the shore if legal, shore defense structures had never been built, but the shore had been left in its natural state. This ruling alters waterfront ownerships for innumerable individual property owners, cities, ports and businesses – virtually any waterfront owner who has erected a bulkhead or other structure to prevent erosion.

As noted by an *amicus curiae* before the Ninth Circuit, 930 miles of the 1100 miles of coastline in California alone is actively eroding. B. Benumof, G. Griggs & L. Moore, *Coastal Erosion: The State of the Problem and the Problem of the State*, *in* 1 CALIFORNIA

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[7] Structures which are permanently attached to land are considered part of the land itself. *See* 8 RICHARD R. POWELL, POWELL ON REAL PROPERTY, ¶¶ 57.02, 57.05 (M.A. Wolf ed., 2000); 5 AMERICAN LAW OF PROPERTY, § 19.1-19.4.

AND THE WORLD OCEAN '97 505 (O. Magoon, *et al.* eds., 1998). *See also* G.B. Griggs, *The Armoring of California's Coast*, *in* 1 CALIFORNIA AND THE WORLD OCEAN '97 518, 521 (Magoon, *et al.*) (describing investments in protecting California beach properties after El Niño years and noting that 12% of California's entire coastline has been protected with structures). Nevertheless, beach erosion is not only a Pacific Coast phenomenon. The Federal Emergency Management Agency in 2000 estimates 25 percent of homes within 500 feet of the Nation's coastline and shores of the Great Lakes will fall victim to erosion. FEMA, *Significant Losses From Coastal Erosion Anticipated Along U.S. Coastlines*, Release No. HQ-00-095 (June 27, 2000).[8]

Not only are bulkheads or seawalls along the coastline at risk of being claimed by the tideland owner, large areas of reclaimed land are also at risk, such as the entire City of New Orleans, Boston's Back Bay, major portions of San Francisco, San Jose, and Seattle, to name a few. They are at risk simply because a variety of embankments have stopped the flow of water and prevented, as they were intended, the erosion of the land.

If this decision is allowed to stand, one can expect a flurry of litigation on the location of the boundary line if it must be based on where the MHW line would

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[8] *Available at* http://www.fema.gov/news/newsrelease.fema?id=7708 (retrieved Jan. 5, 2009).

be if left in its natural state. For a multitude of areas where the coastline has not been in its natural state for decades, if not more than a century, there will be battles of experts opining on where the beach would be based on the hypothetical, "what if nothing were built."

In affirming that the Homeowners are trespassing by the presence of shore defense structures on the tidelands, the Ninth Circuit has announced a startling change in the common law that wreaks havoc on the Pacific Coast. **With one hand** it affirms that "the common law also supports the owner's right to build structures upon the land to protect against erosion." App. 19 (citing *Cass v. Dicks*, 44 P. 113, 114 (Wash. 1896)). "The Homeowners rightly note that the common law permits them to erect shore defense structures on their property to prevent erosion." App. 24. **With the other hand**, it undermines this right by dictating that the tideland owner is actually the owner of the very land sought to be protected from the ravages of the sea.

Support for the common law right to protect uplands from the sea lies in the common enemy doctrine. The Court in *Revell v. People*, 52 N.E. 1052 (Ill. 1898) gathered and quoted several authorities relative to the common enemy doctrine and the right to protect one's property from the sea, including WOOD ON NUISANCES § 494 (2d ed., 1883) and GOULD ON WATERS § 160 (2d ed., 1891).

The Ninth Circuit flatly rejects the common enemy doctrine as a rationale for the Homeowners' position that they are not trespassing, App. 26,[9] although it still recognizes the common law right to protect property from erosion generally.

Regardless of the origin of the right to protect property from erosion, the Ninth Circuit's decision has simply eviscerated that right. Additionally, its decision ignores that the placement of a structure on one's own land becomes part of the land and the MHW line stops at the face of that structure. Instead, it assumes that the property line ignores the existing structure and, instead, permeates it and places the boundary as if the structure never existed.[10]

The essence of the Ninth Circuit's decision is this:

> Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do

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[9] Washington has rejected the common enemy doctrine as an absolute defense to injuries sustained as a result of works to prevent the flooding of sea water. *See Grundy v. Thurston County*, 117 P.3d 1089 (Wash.2005).

[10] Although neither the Homeowners, nor their predecessors filled submerged tidelands, the common law recognizes that if one lawfully fills submerged land, the filled lands belong to the upland owner. *Rights to Land Created at Water's Edge by Filling or Dredging*, Annot., 91 A.L.R.2d 857 (1963).

Here, the Homeowners have not even filled submerged land, but merely fortified uplands so that they do not become submerged.

> not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation.

App. 26-27.

Ultimately, the Ninth Circuit rules that the right to protect one's own property is subordinate to a heretofore unrecognized right in the tideland owner to perpetual erosion, a right that cannot be hindered by any lawful structure placed by the upland owner. App. 26-27.

> [W]e conclude that because both the upland and tideland owners have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain.

App. 20.[11]

The Ninth Circuit cites numerous authorities for the proposition that the right to accreted land is a natural and vested right associated by the ownership of property bounded by a water body. App. 22-23.

Of course, when an upland owner's property increases through the deposit of alluvion (or reliction),

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[11] *Cf. Save Oregon's Cape Kiwanda Organization v. Tillamook County*, 177 34 P.3d 745, 751 (Or.Ct.App. 2001) (affirmed findings that riprap along the shore would as a practical matter "effectively fix the position of the shoreline").

it is not at the expense of the tideland owner. The tidelands simply move (in this case, to the west) from their former location where they bordered the upland in its former state.

On the other hand, when upland is subject to erosion, the upland owner clearly loses property and, in this case, subjects the home on the property to a complete loss if the erosion is not abated.

The Ninth Circuit twists these well-established principles to create a new doctrine, not supported in law or history, that a property owner cannot as a matter of property law make otherwise lawful efforts on their own property that might minimize the risk of erosion solely because minimizing erosion would infringe on the tideland owners' supposedly vested right to future erosion.

While the Ninth Circuit correctly observes that water boundaries often are regarded to be ambulatory, it incorrectly supposes that property owners therefore have no right to pause or reduce ambulation of the boundary. For the Ninth Circuit's ruling to remain, the result is that every lawfully allowed structure that prevents erosion is trespassing against whomever owns the submerged lands adjacent to the dike, seawall, embankment or bulkhead. Furthermore, the property owners on both sides of the line are in the impossible position having to divine where the line would be if the structure were never built. The serious consequences for areas such as Seattle, Portland, San Francisco, and Los Angeles are obvious. If

this is the federal rule of property, numerous developed areas are also at risk of having the titles uncertain, such as the entire City of New Orleans, Boston's Back Bay, or any reclaimed land. This Court should grant the writ Homeowners seek.

II. The Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals regarding the scope and requirements of the Rivers and Harbors Act.

In addition to finding the Homeowners liable for trespass, the Ninth Circuit held that Homeowners' shore defense structure violated the Rivers and Harbors Act, even though the structure did not require a permit when built. Indeed, the Ninth Circuit expressly recognized:

> The Homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters and are obstructions.

App. 32 (footnote omitted).

The Ninth Circuit's holding on the RHA constitutes a rearranging of the statute's text, blending distinct provisions to create a completely new violation – one where activity that required no permit and creates no obstruction to navigation nonetheless can be held to violate the RHA. Such a wide, sweeping alteration of the RHA's provisions affects every property owner bordering a navigable water of the United

States and places in legal jeopardy every bulkhead, dike, or seawall originally erected out of Corps jurisdiction.

A. The RHA's prohibitions.

Section 10 of the RHA, 33 U.S.C. § 403, contains three clauses, creating three different types of violations:

> [1] The **creation** of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and
>
> [2] it shall not be lawful **to build** or **commence the building** of any . . . bulkhead, jetty, or other structures in any . . . water of the United States, . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and
>
> [3] it shall not be lawful **to excavate or fill**, or in any manner **to alter or modify** the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army **prior to beginning the same**.

33 U.S.C. § 403 (line breaks, numbering and emphasis added), reproduced at App. 109.

The first clause prohibits the "creation of any obstruction" to the "navigable capacity . . . of the waters of the United States." The creation of such an obstruction cannot be approved by the Corps – it can only be approved by Congress. The second clause prohibits building or commencing the building of a structure in waters of the United States without a permit from the Corps of Engineers. The third clause prohibits filling, excavating, modifying or altering navigable waters without a permit from the Corps of Engineers.

The Ninth Circuit's decision goes beyond these prohibitions, claiming that the RHA makes unlawful the mere existence and maintenance of structures in navigable waters – even if originally built entirely outside of navigable waters. This claim is troubling. First, the statute does not include the word "maintain" in the list of prohibited activities. *See* 33 U.S.C. § 403. By its plain terms, the statute is limited to activities, *i.e.*, creating, building, filling and excavating in navigable waters. Courts may not add words to the statute (especially one for which criminal penalties apply), which Congress chose not to include. Rather, this Court has consistently recognized that courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

Moreover, it is notable that the Government did not seek to enforce Section 13 of the RHA, 33 U.S.C. § 407, commonly referred to as the Refuse Act.

As explained by this Court in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), this statute contains "two separate offenses", namely the discharge or deposit of refuse into navigable waters and the **deposit of material on the bank** of a navigable waterway that impedes or obstructs navigation. *Id.* at 662. This Court concluded that the first Section 13 offense did not require any effect on navigation – in part because the reference to navigation in the statute was tied to the placement of material on the banks, an element of the second offence. *Id.* at 672 n.23.

In affirming a violation of Section 10 of the RHA here, the Ninth Circuit plainly circumvents the choice by Congress that the placement of material on banks would be governed by Section 13 – which limits liability to deposits that affect navigation.[12]

Not only does the Ninth Circuit's decision have far reaching implications for the owners of waterfront property, but as addressed below, it conflicts in several respects with decisions of other courts.

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[12] Additionally, violations of Section 13 of the RHA (33 U.S.C. § 407) are enforced through 33 U.S.C. § 411, and not through 33 U.S.C. § 406, the statute relied upon by the Government in this case.

B. The Ninth Circuit's decision conflicts with the decisions of this and other courts regarding the first clause of Section 10 of the RHA.

To find liability under the first clause of 33 U.S.C. § 403, the Government must show that the obstruction is not merely **in** navigable waters, but rather **is an obstruction to** the **navigable capacity** of the waterway. Such an obstruction cannot be authorized by the Corps, but only by Congress. More importantly, this Court has held that it is "a **question of fact** whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 729 (1899) (emphasis added).[13] Here, the Government contended that it need not show that Homeowners' structures actually impacted navigation.

In reaching this conclusion, the Ninth Circuit relied on its earlier decision in *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161 (9th Cir. 2000), a case involving the first clause of Section 10. *Id.* at 1165. The *Alameda Gateway* decision demonstrates the necessity of interfering with navigation to find a violation. The focus of the court in that case was the interference the pier at issue posed to the navigable

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[13] This case describes the RHA prior to the 1899 amendment. However, the point of law for which it is cited remains valid (*i.e.*, the determination of whether something constituted an obstruction is a question of fact).

capacity of the harbor. *Id.* ("Gateway's piers prevented the creation of a turning basin that could safely accommodate larger vessels entering the Harbor.").

Here, however, the Ninth Circuit concluded that the "structure" at issue was an "obstruction" for two reasons. First, the Ninth Circuit reasoned that the structure is the result of activities that require a permit under the second clause, **if they were conducted in navigable waters**. But this reasoning is circular in that the Homeowners' activities did not require a permit under the second clause precisely because they were not conducted in navigable waters.

The other reason offered by the Ninth Circuit is that, under its own precedent in *Alameda Gateway,* lawfully built obstructions can still be subject to removal. App. 31 (citing *Alameda Gateway* and *United States v. New York Central R.R.*, 252 F. Supp. 508, 511 (D.Mass. 1965) (finding landward remnants of a previously legal bridge an obstruction), *aff'd per curiam*, 358 F.2d 747 (1st Cir. 1966)). The problem with the Ninth Circuit's reliance on *Alameda Gateway* and *New York Central* is that in both cases there were actual obstructions to navigation present. In *New York Central*, it was a collapsed bridge that "caused additional danger of injury to tankers." 252 F.Supp. at 510. There is no authority for the proposition that structures that do not actually obstruct the navigable capacity of the water – like Homeowners' shore defense structure – can constitute violations of the first clause.

Beyond this, the Ninth Circuit asserted that structures that violate the second or third clauses are "presumed to be obstructions under the first clause," App. 32, relying on its decisions in *Alameda Gateway*, 213 F.3d at 1165, and *Sierra Club v. Andrus*, 610 F.2d 581, 596 (9th Cir. 1979). However, this Court reversed the Ninth Circuit's decision in *Andrus* on other grounds. *California v. Sierra Club*, 451 U.S. 287 (1981). Nevertheless, the Ninth Circuit's ruling that structures that violate the second or third clauses also violate the first clause is preposterous given that it necessarily places all actions in navigable waters within the scope of the first clause, and thus within Congress' exclusive permitting authority – thereby rendering the Corps' permitting powers under the second and third clauses superfluous.

Finally, given the circumstances in this case, finding Homeowners liable under the first clause of the RHA is nonsensical. The Court's decision flies in the face of the undisputed fact that Homeowners did not place anything in RHA jurisdiction – that is, seaward of MHW – at the time it was placed. The law is clear that an obstruction within the meaning of the first clause requires Congressional approval. Thus, even though no permit was needed for the original construction of Homeowners' shore defense structures, under the Ninth Circuit's reasoning they can be liable based on changes to the shoreline caused by others – and their only protection from liability is an "after the fact" permit **from Congress**. The Ninth

Circuit's interpretation of the first clause of Section 10 of the RHA should be reviewed by this Court to eliminate such a burdensome, unintended result.

C. The Ninth Circuit's decision regarding the second clause of Section 10 of the RHA raises important questions of federal law that have not been, but should be, answered by this Court.

After declaring that all second and third clause violations result in a violation of the first clause, the Ninth Circuit ruled that there is no need for an actual obstruction of navigable capacity of the water body, "since the structures obviously qualify as a 'breakwater, bulkhead, . . . or other structure' under clause two." App. 33.

This superficial analysis again ignores the statutory language. To find a violation under the second clause, the Homeowners must have "buil[t]" the structure "in" waters of the United States. As the Ninth Circuit expressly acknowledges, this structure was built above the MHW line and, therefore, out of navigable waters. App. 32.

Here, Homeowners have not **built** a structure **in** navigable waters. They built out of navigable waters, above MHW at the time of construction. Subsequent changes to the beach have caused MHW to reach their riprap. The Court's decision to impose liability under Section 10 of the RHA assumes the verbs in the statute, "to build" or "commence the building of,"

mean nothing. To overlook the operative words of the statute means liability can attach under the RHA even where no permit was needed at the time the work was done. The Court should settle this important issue affecting practically all waterfront property in the Nation.[14]

D. The Ninth Circuit's decision regarding the third clause of Section 10 of the RHA raises important questions of federal law that have not been, but should be, answered by this Court.

The Ninth Circuit held that one can violate the second or third clause "even if the structure or activity is not located in navigable waters." App. 35 (citing *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1298 (5th Cir. 1976)). *Sexton Cove*, however, involved excavating the shore to create canals and alter the water body by expanding it. The activity directly and significantly altered the shape and size of the water body. Hence, *Sexton Cove* does not support the Ninth Circuit's conclusion.

Moreover, as with the second clause, the Ninth Circuit's decision ignores the unmistakable operative language in the third clause that one must fill,

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[14] The Ninth Circuit's decision also directly conflicts with the New York court in *People v. Amerada Hess Corp.*, 84 Misc.2d 1036 (1975) in interpreting analogous rules in a case where material was placed on the banks, rather than in the water.

excavate, alter or modify the water body without first having obtained a permit from the Corps. 33 U.S.C. § 403 (App. 109). Homeowners took no actions to alter or modify the water body; rather, they and their predecessors took actions to prevent the water body from destroying their property by building a shore defense structure outside of the water body, above MHW.

As with its ruling on the other clauses of Section 10 of the RHA, the Ninth Circuit's ruling potentially subjects anyone to liability under the RHA who built or owns a shore defense structure above MHW on any navigable waterway in the country. It does so by ignoring the language chosen by Congress to describe violations. This Court should review the Ninth Circuit's decision.

E. The Ninth Circuit's elimination of an intent requirement for a RHA violation conflicts with the decisions of other courts of appeals.

The Ninth Circuit clearly repudiated the need for intent to find a RHA violation, other than the mere intent to do nothing in regard to preexisting bulkheads or riprap. App. 36 (affirming App. 57 n.7). This holding conflicts with decisions from the Court of Appeals for the Third Circuit.

The Court in *United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) made clear that there is no strict liability under 33 U.S.C. § 403 because it exposes one to criminal sanctions, including

imprisonment. *Id.* at 628. Such statutes are to be construed strictly. *Id.* (citing *United States v. Bigan*, 170 F.Supp. 219, 223 (W.D.Pa. 1959), *aff'd*, 274 F.2d 729 (3d Cir. 1960)).

The Ninth Circuit treats Section 10 of the RHA as imposing strict liability, as does the Eleventh Circuit. *See United States v. Baycon Industries, Inc.*, 744 F.2d 1505, 1507 n.6 (11th Cir. 1984). The Third Circuit does not. *Bigan*, 274 F.2d 729; *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 310 (3d Cir. 1997). The Fifth Circuit recognized the split, but declined to decide on which side of the split it would land. *United States v. Nassau Marine Corp.*, 778 F.2d 1111, 1113-14 (5th Cir. 1985).

This Court should settle this important issue and decide whether Homeowners can be liable for the placement of riprap outside of the jurisdictional boundary of the RHA simply because the boundary moved toward their riprap through no fault of their own.

F. The Ninth Circuit's decision on the availability of and conditions applicable to injunctive relief under the RHA should be reviewed by this Court.

1. The Ninth Circuit's decision that the enforcement provisions in Section 12 of the RHA apply is an important issue which should be settled by this Court.

If Homeowners are required to get a RHA permit even though they constructed outside of navigable waters, the enforcement provision of the RHA (Section 12) does not allow for an injunction in these circumstances. It provides that "removal of any structures or parts of structures **erected in** violation of the provisions of [the RHA or its implementing regulations] **may** be enforced by the injunction of any district court." 33 U.S.C. § 406 (App. 109) (emphasis added). Thus, by the statute's plain terms, the enforcement power extends only to structures "**erected** in violation" of the RHA. *Id.* (emphasis added). The Homeowners did not erect anything in violation of the RHA. They are accordingly not within the scope of 33 U.S.C. § 406.

This distinction between Sections 10 and 12 was explained by the Third Circuit in *Bigan*, 274 F.2d 729. In *Bigan*, the property owner had engaged in strip mining on uplands, but earth which had been removed during mining and negligently piled near a navigable river washed into the river during a torrential rain. *Id.* at 730.

The Third Circuit found that an injunction was inappropriate because of the limited scope of Section 12. *Id.* at 732. In the same vein, while Homeowners or their predecessor built a shore defense structure, they did not "erect it" in violation of the RHA.

The Ninth Circuit's affirmation of the injunction under the RHA does violence to Congressional choice of words in the statute and perpetuates a conflict among the Circuits which should be settled by this Court.

2. The Ninth Circuit's ruling that an injunction is automatic conflicts with decisions from this and other courts.

In affirming the issuance of the district court's injunction, the Ninth Circuit held that there is no need to balance competing interests. App. 36 (citing *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974)). This decision conflicts with decisions from this and other courts.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), this Court made clear that the issuance of an injunction is an extraordinary remedy that involves the balancing of competing interests. In *Weinberger*, an injunction was denied despite discharges of pollutants in violation of the CWA. Although *Weinberger* was specifically briefed by the Homeowners, the Ninth Circuit simply ignored it and instead relied on *Stoeco*, a Third Circuit decision

that pre-dates *Weinberger*, for the proposition that equitable considerations should not be considered in determining whether Homeowners should be enjoined in the circumstances of this case.

Several other courts have explained that injunctions under the RHA are subject to equitable considerations because of the "may" language in the statute. *See South Carolina ex rel. Maybank v. South Carolina Elec. & Gas. Co.*, 41 F.Supp. 111, 119 (E.D.S.C. 1941); *United States v. Bailey*, 467 F.Supp. 925 (E.D.Ark. 1979).

Equitable considerations are especially critical in the present case. The district court's order to remove the riprap is impractical because the Homeowners must keep moving riprap based on constantly changing beach conditions. Courts have properly recognized that a moving tidal boundary line caused by winter/summer fluctuations is a factor that weighs against injunctive relief because of uncertainty and constant movement. *People v. William Kent Estate Co.*, 51 Cal.Rptr. 215, 219 (Cal.Dist.Ct.App. 1966).

The Court should issue the writ to resolve whether injunctive relief under Section 12 of the RHA is subject to the normal equitable balancing of interests indicated by this Court in *Weinberger*.

III. The Ninth Circuit's opinion has decided an important question of federal law in a way that conflicts with relevant decisions of this Court regarding the reservation of submerged lands from future states.

Whether the Homeowners are trespassing against the United States and Lummi Nation rests upon the assumption that the Government owns the tidelands. Federal ownership of the tidelands, in turn, hinges on whether the Government retained title to the tidelands upon Washington's admission to the Union in 1889. The answer to this depends upon the "equal footing doctrine," which presumes that new states enter the Union on the same footing as the original thirteen in regard to state ownership of submerged lands. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 195-198 (1987).

This Court has reiterated this doctrine by stating that the courts must "begin with a **strong presumption against**" any action that would defeat a future state's title. *Montana v. United States*, 450 U.S. 544, 552 (1981) (emphasis added). In *Utah Division*, this Court clarified its earlier *Montana* decision by stating that Congress defeats the strong presumption of state title "only in the most unusual circumstances." *Id.* at 197. The Ninth Circuit's decision on ownership of the tidelands contradicts this Court's emphatic language that submerged lands are presumed to have been transferred to a new state.

The Ninth Circuit's rationale for its decision on this issue can be distilled to the following bases:

- First, *stare decisis* dictated the result absent a contrary decision from this Court, insofar as prior decisions had ruled that the Lummi Nation owns some tidelands at Sandy Point. *See United States v. Romaine*, 255 F. 253 (9th Cir. 1919); *United States v. Stotts*, 49 F.2d 619 (W.D.Wash. 1930); *United States v. Washington*, 969 F.2d 752 (9th Cir. 1992).
- Second, the absence of the State of Washington as a party to this case counseled against a conclusion that title resided in the state.
- Third, the tidelands were withheld from the state under this Court's Equal Footing Doctrine jurisprudence.

As to the first basis, "the doctrine of stare decisis does not apply with full force prior to decision in the court of last resort." *Posados v. Warner, Barnes & Co.*, 279 U.S. 340, 345 (1929). Moreover, the cases relied upon do not control the questions presented here.[15]

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[15] *Romaine* involved tidelands in the river delta reserved specifically by the Treaty, which was explicitly approved by Congress, rather than the Sandy Point tidelands which are included only by the Executive Order.

United States v. Washington is even more attenuated because the issue was whether the reservation boundary followed a straight line at one point or followed the shore, not on Sandy

(Continued on following page)

Nor do these cases create a rule of property that cannot be revisited.[16]

In regard to the second basis for the Court's decision, the Ninth Circuit indicated that absence of the State of Washington in this litigation supports its conclusion that the tidelands are not owned by the state. App. 14. This directly conflicts with this Court's seminal decision in *Pollard v. Hagan*, 44 U.S. 212 (1845), involving an ejectment action (similar to

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Point. That the Treaty and the Executive Order were consistent on this issue, 969 F.2d at 755-56, provides no resolution of whether the Executive Order alone was sufficient to prevent tidelands from transferring to the State of Washington.

Similarly, the district court decision in *Stotts* is not controlling because it is not clear where the tidelands in that case were located or whether they were reserved by the Executive Order alone. *Stotts* did not answer the questions raised here.

[16] *Compare Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946) (revisiting issue of tribal ownership of tidal waters) *with Taylor v. United States*, 44 F.2d 531 (9th Cir. 1930).

Moreover, the Ninth Circuit assumes that the Lummi Nation and homeowners have "long relied on the fact that the Lummi own the tidelands," pointing to an old lease of tidelands at Sandy Point. App. 15. However, the Sharps never had a lease with the Lummi Nation. That a homeowners association representing people from other parts of Sandy Point at one time leased the tidelands is not the kind of long term reliance or burden on existing expectations that creates a rule of property. *See Montana v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 665 F.2d 951 (9th Cir. 1982) (referring to substantial sums flowing to the tribe from leases from a hydroelectric facility). Indeed, instead of longstanding expectations that the federal government owns these tidelands, there has been a longstanding uncertainty over that question.

trespass) where the defendant argued successfully that the plaintiff did not own the property at issue because it consisted of the bed of navigable waters given to the State of Alabama – despite the facts that the state was not a party and the claim of ownership did not derive from the state.[17]

With regard to the third basis, the Ninth Circuit held that even when the Executive Order is viewed in light of this Court's recent equal footing jurisprudence, President Grant's order extending the reservation to include tidelands was sufficient to withhold these tidelands from the state. App. 15. Specifically, the Ninth Circuit claimed the two part test from *Idaho v. United States*, 533 U.S. 262, 273 (2001), was satisfied in this case. App. 15. This test asks "whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands." *Idaho*, 533 U.S. at 273.

The second part of the test is at issue here. The Ninth Circuit's application of the second part of the test is a radical departure from this Court's jurisprudence. The Ninth Circuit concluded that Congress "recognized the validity of the executive order

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[17] It is also contrary to the Ninth Circuit's prior precedent that a party accused of trespass may argue that a non-party State actually owns the property. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255-56 (9th Cir. 1983).

reservation by requiring Washington state to 'forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes.'" 25 Stat. at 677, *quoted at* App. 17. Under the precedent set by the Ninth Circuit in this case, this general, boilerplate disclaimer language, common among states admitted in the west, is sufficient to overcome the strong presumption against withholding title to the beds of navigable waters – despite the lack of any specific recognition of what was reserved.[18]

Although the Ninth Circuit purports to rely upon this Court's decision in *United States v. Alaska (Arctic Coast)*, 521 U.S. 1 (1997), its decision is directly contrary to this Court's ruling in that case. In *Arctic Coast,* this Court emphasized that Congress has never given the President authority to defeat state title to land under navigable waters by a general statute. 521 U.S. at 44. Rather, this Court has always viewed the equal footing doctrine to require that the land being withheld from the new state be identified with particularity.

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[18] In *Idaho*, after noting that the disclaimer provision in the Idaho Statehood Act was a boilerplate formulation used with every State admitted between the years 1889 and 1912, including Washington, the four dissenting Justices noted:

> This disclaimer, in any event, simply begs the question whether submerged lands were in fact "owned or held" by the Coeur d'Alene Tribe upon Idaho's admission.

533 U.S. at 285 n.2 (Rehnquist, C.J., dissenting).

The *Arctic Coast* case involved two federal reservations prior to Alaska statehood, one of which was identified **by name**, *id.* at 41-42, and the other was specifically withheld from Alaska. *Id.* at 56-57 (certain statutorily described wildlife refuges transferred to Alaska while retaining federal ownership of all other submerged lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife").

Similarly, in *Alaska v. United States (Glacier Bay)*, 545 U.S. 75 (2005), this Court held that Congress specifically withheld the Glacier Bay National Monument in the Alaska Statehood Act. In both *Arctic Coast* and *Glacier Bay*, this Court required an act of Congress expressly confirming the prior executive order reservations. The boilerplate disclaimer in the Washington Statehood Act is nothing like the specific Congressional references to the tracts at issue in the *Alaska* cases.

The conflict with this Court's analysis in *Idaho v. United States*, 533 U.S. 262, is even more pronounced. There, this Court went to great lengths to address exactly what Congress did in regard to the Coeur d'Alene Indian Tribe.

While the Court referenced the disclaimer in the Idaho Statehood Act, wherein the new state of Idaho disclaimed ownership of lands held by Indians, 533 U.S. at 270, the Court's decision rests upon other, specific indicia of Congressional intent to withhold the submerged lands at issue. For example, the Court

noted that both houses of Congress had approved the treaty with the Coeur d'Alene that included the lake in the reservation prior to Idaho's statehood, though it had not been finalized by the time Idaho became a state. The Court noted there was no "hint in the evidence that delay in final passage of the ratifying Act was meant to pull a fast one by allowing the reservation's submerged lands to pass to Idaho." *Id.* at 278.

Second, this Court also noted that Congress had extensive involvement with the Coeur d'Alene Tribe. The Ninth Circuit's decision ignores the significance of this point. There is no evidence of Congressional involvement with the Lummi Nation that is remotely similar to that deemed essential in *Idaho*.

The Ninth Circuit's decision in this case directly conflicts with all these authorities confirming that the inclusion of tidelands in a reservation by order of the executive – as opposed to a treaty or statute which specifically references the reserved area – is insufficient to prevent title to the tidelands from passing to a state upon statehood under the equal footing doctrine. If the mere existence of an executive order were sufficient to defeat the strong presumption against withholding submerged lands from future states, this Court's analyses in *Idaho, Arctic Coast* and *Glacier Bay* have been utterly superfluous.

At bottom, this Court should review the Ninth Circuit's re-interpretation of this Court's equal footing precedents that find the requirement of "extraordinary circumstances" met by a very ordinary boilerplate, generalized disclaimer.

CONCLUSION

The implications of the Ninth Circuit's trespass and RHA decisions for waterfront property owners cannot be overstated. The consequences of the Ninth Circuit's opinion will become only more pronounced as erosion increases or sea levels rise.

Additionally, the respective balance of authority between the executive, Congress and the rights of new states is significantly altered by the Ninth Circuit's resolution of the equal footing doctrine case. This Court is urged to grant the writ to resolve the issues raised herein.

DATED: January 7, 2010.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,

Plaintiff-Appellee,

v.

KEITH E. MILNER,

Defendant,

and

BRENT C. NICHOLSON; MARY K. NICHOLSON,

Defendants-Appellants,

v.

LUMMI NATION,

Plaintiff-intervener-Appellee.

No. 05-35802

D.C. No. CV-01-00809-RBL

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation,

Plaintiff-Appellee,

v.

KEITH E. MILNER,

Defendant-Appellant,

SHIRLEY A. MILNER; MARY D. SHARP; IAN C. BENNETT; MARCIA A. BOYD,

Defendants-Appellants,

and

BRENT C. NICHOLSON; MARY K. NICHOLSON,

Defendants,

v.

LUMMI NATION,

Plaintiff-intervener.

No. 05-36126

D.C. No. CV-01-00809-RBL

OPINION

Appeal from the United States District Court for the Western District of Washington Ronald B. Leighton, District Judge, Presiding

Argued March 13, 2008
Submitted October 9, 2009
Seattle, Washington

Filed October 9, 2009

Before: Betty B. Fletcher, Richard A. Paez and Richard C. Tallman,* Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Richard M. Stephens, Groen Stephens & Klinge LLP, Bellevue, Washington, for the defendants-appellants.

Brian Kipnis, Office of the United States Attorney, Seattle, Washington, for the plaintiff-appellee.

Harry L. Johnsen, Raas, Johnsen & Stuen, P.S., Bellingham, Washington, for the plaintiff-intervenor-appellee.

Edgar B. Washburn, Morrison & Foerster LLP, San Francisco, California, for Amicus Building Industry Legal Defense Foundation.

John Briscoe, Briscoe Ivester & Bazel LLP, San Francisco, California, for Amicus Bay Planning Coalition.

OPINION

B. FLETCHER, Circuit Judge:

In this appeal we decide whether a group of waterfront homeowners are liable for common law

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* Judge Tallman was drawn to replace Judge William W. Schwarzer, Senior United States District Judge for the Northern District of California, and has read the briefs, reviewed the record, and listened to a recording of oral arguments.

trespass and violations of the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. § 403, and the Clean Water Act (CWA), 33 U.S.C. § 1311, because the ambulatory tideland property boundary has come to intersect shore defense structures the homeowners have erected. In a series of summary judgment rulings and after a bench trial, the district court found against the homeowners and ordered them to remove violating structures and to pay a $1500 civil penalty. We affirm in part and reverse in part.

I.

In 1855, the United States executed the Treaty of Point Elliott with several Indian tribes, thereby acquiring a vast swath of what is now western Washington.[1] Treaty Between the United States and the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (1859) (the "Treaty of Point Elliott" or the "Treaty"). Under the terms of the Treaty, the tribes were relegated to certain reserved areas, including "the island called Chah-choo-sen," on which the Lummi Indian Reservation was created for

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[1] The Treaty of Point Elliott is one of a series of treaties negotiated by Territorial Governor Isaac Stevens with various Pacific Northwest Indian tribes in the mid-1800s. *See generally Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62 (1979); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 805-06 (D. Idaho 1994).

the plaintiff-intervenor, the Lummi Nation. *Id.* at 928. Although the Lummi initially occupied only the island, by an executive order, President Grant in 1873 expanded the reservation to encompass portions of the mainland, including Sandy Point, a sandy spit, all in what is now Whatcom County, Washington. Exec. Order (Nov. 22, 1873), *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 917 (1904), *available at* http://digital.library.okstate.edu/kappler/Vol1/Images/v1p0917.jpg. Importantly, the order extended the reservation boundaries to "the low-water mark on the shore of the Gulf of Georgia."[2] *Id.* In other words, President Grant explicitly expanded the reservation to include the tidelands of the relevant area. *United States v. Stotts,* 49 F.2d 619, 619, 621 (W.D. Wash. 1930).

As allowed under President Grant's executive order, the uplands were divided into lots and patented by members of the tribe. Defendants-appellants Keith and Shirley Milner (the "Milners"), Mary Sharp, Brent and Mary Nicholson (the "Nicholsons"), and Ian Bennett and Marcia Boyd ("Bennett/Boyd") (collectively, the "Homeowners") are the successors in interest to some of the parcels derived from these original patents. The Homeowners' parcels all adjoin tidelands on the Strait of Georgia.

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[2] The "Gulf of Georgia" is now known as the Strait of Georgia.

Unlike the Homeowners' properties, the tidelands within the Lummi Reservation have otherwise never been alienated. Plaintiff-appellee the United States claims that it continuously has held the tidelands in trust for the Lummi Nation, pursuant to President Grant's executive order. Not surprisingly, then, it is at the boundary between the tidelands and the uplands that the present dispute finds its locus.

Although each property is slightly different, the Homeowners or their predecessors erected various "shore defense structures" to limit erosion and storm damage to their properties. The structures generally include "rip rap," large boulders used to dissipate the force of incoming waves, and bulkheads placed landward of the rip rap. Between 1963 and 1988, a homeowners' organization (the "Organization") had leased the tidelands from the Lummi Nation, giving waterfront property owners the right to erect shore defense structures on the tidelands; however, once the lease expired, both the Organization and the individual Homeowners declined to renew the lease.

Under federal law, the upper boundary of any tidelands is the mean high water (MHW) line, which is determined by projecting onto the shore the average of all high tides over a period of 18.6 years. *Borax Consol. Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935). Over time, the Sandy Point shoreline has eroded significantly, so that as of January 2002, the date of the most recent survey in the record, some of the Homeowners' shore defense structures sat seaward of the MHW line and within the Lummi

tidelands.[3] Given the expiration of the lease, the Homeowners do not have permission from the United States or the Lummi Nation to maintain structures on the tidelands, and they also lack permits to maintain structures in navigable waters of the United States or to discharge fill material into the waters of the United States.

The United States Army Corps of Engineers, and later the United States Attorney for the Western District of Washington, sent letters to the Homeowners demanding removal of the structures or alternatively that the Homeowners enter into agreements to lease the tidelands. When the Homeowners did not remove the structures, the United States filed virtually identical complaints against the separate Homeowners, alleging three causes of action: (1) trespass; (2) violation of § 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. § 403; and (3) violation of § 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a).[4] The Lummi Nation intervened in the consolidated action to assert its interest as the beneficial owner of the tidelands.

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[3] Further complicating matters is the fact that the extent of the shore changes seasonally, though mean high water stays relatively constant.

[4] Although the United States originally sued six landowners, the government and the Lummi Nation reached a settlement with one landowner and entered into a consent decree with another.

In a series of partial summary judgment rulings, District Judge Rothstein held that (1) the tidelands were owned by the United States, not the state of Washington; (2) the erosion of the Homeowners' property was not caused by an avulsive event inundating the uplands;[5] and (3) the tideland boundary line was ambulatory and was not arrested by the Homeowners' shore defense structures, so that it lay where the MHW line would be located but for the Homeowners' structures. Judge Rothstein then ruled on summary judgment that the Homeowners were liable for trespass and violation of the RHA, and that the Nicholsons had violated the CWA. Although the United States had sued the other Homeowners for violation of the CWA, it later dismissed those claims against all but the Nicholsons.

After finding liability, Judge Rothstein imposed an injunction under the RHA ordering the Homeowners to remove any shore defense structures located seaward of the MHW line. District Judge Leighton subsequently conducted a bench trial to determine what penalties to impose on the Nicholsons for the CWA violation. He imposed a $1500 fine – far less than what the government sought – and ordered

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[5] Under the doctrine of avulsion, a sudden and abrupt change in the shoreline – an avulsive event – does not alter the boundary line. *New Jersey v. New York*, 523 U.S. 767, 784 (1998); *California ex rel. State Lands Comm'n v. United States*, 805 F.2d 857, 864 (9th Cir. 1986). The Homeowners do not appeal the district court's ruling that the doctrine of avulsion does not apply.

them to remove rip rap below a certain point. Additionally, Judge Leighton heard the Milners' and Bennett/Boyd's motion for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which he denied.

The Homeowners timely appealed, challenging the summary judgment rulings on the trespass, RHA, and CWA claims, as well as the injunctive relief imposed by the district court. The Homeowners also argue that the district court erred in denying the EAJA motion. We address these arguments in turn.

II.

The district court had jurisdiction over the trespass claims under 28 U.S.C. § 1345, the RHA claims under 28 U.S.C. §§ 1331, 1345 and 33 U.S.C. § 406, and the CWA claims under 28 U.S.C. §§ 1331 and 1345. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment de novo. *Universal Health Servs., Inc. v. Thompson,* 363 F.3d 1013, 1019 (9th Cir. 2004). We review a district court's grant of injunctive relief for abuse of discretion and will reverse if the district court based its decision on an erroneous legal standard or a clearly erroneous finding of fact. *Fortyune v. American Multi-Cinema, Inc.,* 364 F.3d 1075, 1079 (9th Cir. 2004). The decision whether to award fees under the EAJA also is reviewed for abuse of

discretion. *United States v. Marolf*, 277 F.3d 1156, 1160 (9th Cir. 2002).

III.

A.

Federal common law governs an action for trespass on Indian lands. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994); *see also Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235-36 (1985). That law generally comports with the Restatement of Torts, and in any event, Washington law conforms to the Restatement definition of trespass.[6]

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[6] In some instances, "[c]ontroversies governed by federal law do not inevitably require resort to uniform federal rules," and it may be appropriate to borrow from state law for the rule of decision. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982). For example, in *Wilson v. Omaha Indian Tribe*, the Supreme Court held that although federal law determined the question of ownership of land continuously held by the United States for an Indian tribe, state law could be borrowed to provide the applicable rules of avulsion and accretion. 442 U.S. 653, 670-71, 673-74 (1979). While it is clear that the federal common law of trespass applies here, it is less clear whether the application of the common enemy doctrine, discussed below, should be decided based on a uniform federal common law or borrowed Washington state law, which holds that the doctrine does not apply to sea water. *See Grundy v. Thurston County*, 117 P.3d 1089, 1094 (Wash. 2005). We note that it would be anomalous for the *Grundy* decision to apply to other coastal property owners in Washington, yet not to this small group of homeowners. Nevertheless, we need not decide the issue, because we conclude that the common enemy doctrine

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See United States v. West, 232 F.2d 694, 699 (9th Cir. 1956) (citing Arizona case law and the Restatement (First) of Torts to define trespass); *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (applying Restatement (Second) of Torts to federal trespass action); *United States v. Osterlund*, 505 F. Supp. 165, 167 (D.C. Colo. 1981) (same); *cf. Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 785 (Wash. 1985) (quoting Restatement (Second) of Torts definition of trespass). Under the Restatement, a person is liable for trespass "if he intentionally . . . causes a thing [to enter land in the possession of another], . . . [or] fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) of Torts § 158 (2009).

The district court found it uncontested that portions of the Homeowners' shore defense structures were seaward of the MHW line and therefore in Lummi tidelands. Nevertheless, the Homeowners make three arguments that they cannot be liable for trespass. First, they argue that Washington state, not the United States, owns the tidelands; therefore, the United States cannot properly assert an action for trespass against them. Second, they contend that because their structures were lawfully built landward of the MHW line – that is, on the Homeowners' property – they cannot be liable for trespass, despite

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is inapplicable regardless of whether *Grundy* provides the federal rule of decision.

the movement of the tideland boundary. Finally, they argue that the elements of intent and causation were not satisfied. We conclude that none of these arguments is correct.

1.

[1] The Homeowners' ownership argument turns on the effect of President Grant's executive order and its force under the "equal footing" doctrine. To put newly admitted states on an "equal footing" with the original states, the doctrine creates a strong presumption that newly admitted states acquire title to lands under navigable waters upon their admission to statehood. *Idaho v. United States,* 533 U.S. 262, 272-73 (2001). The presumption is rebutted (1) if such lands have been reserved by the United States, and (2) if Congress recognizes the reservation in a way that demonstrates an intent to rebut the presumption. *Id.* at 273. According to the Homeowners, because President Grant's executive order could not permanently reserve the tidelands for the Lummi, under the equal footing doctrine, title passed to the state of Washington when it became a state.[7]

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[7] The United States argues that the Homeowners cannot assert Washington state's title in the tidelands because in a trespass action "[t]itle in a third person may not be alleged by a defendant who is not in privity of title with the third person," and the Homeowners do not claim to be in privity with the state. 75 Am. Jur. 2d Trespass § 62 (2009). However, this applies where the plaintiff is the one in possession and, in moving for

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[2] Prior quiet title actions make clear that President Grant's executive order was sufficient to prevent ownership from passing to Washington. In *United States v. Romaine*, the United States sought to quiet title against individuals who had bought Lummi tidelands from the state of Washington. 255 F. 253, 253 (9th Cir. 1919). This court held the president's executive order to be decisive and rejected an argument that the reservation extended only to the high-water mark. *Id.* at 259-60. *Romaine* noted that when Washington was admitted as a state, it disclaimed any right and title

> to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands

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partial summary judgment on the issue of ownership, the United States did not present evidence showing that it or the Lummi Nation was currently in possession of the tidelands. *See Thomsen v. State*, 422 P.2d 824, 827 (Wash. 1966) ("The presumption of the law that the person who has the possession has the property may not be rebutted by evidence that the property was in a third person, when offered as a defense by one who claims no title and was a wrongdoer.").

The United States' issue preclusion argument is similarly without merit, since the prior cases that the government relies on do not involve the Homeowners and the Homeowners are not subject to the binding effect of the prior judgments. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2172-73 (2008) (describing the six circumstances in which a nonparty can be bound by a prior decision).

> shall remain under the absolute jurisdiction and control of the Congress of the United States.

Id. at 260 (quoting Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677). *United States v. Stotts* similarly involved a suit by the United States to quiet title in Lummi tidelands purchased from the state. 49 F.2d 619, 619 (W.D. Wash. 1930). Distinguishing *United States v. Holt State Bank,* 270 U.S. 49 (1926), one of the earliest cases establishing the contours of the equal footing doctrine, *Stotts* held that unlike in *Holt* the Lummi had a specific declaration reserving the tidelands for them. *Stotts,* 49 F.2d at 621. *Stotts* also noted that the Treaty of Point Elliott clearly gave the Lummi and other tribes the right to fish in their "usual and accustomed grounds and stations" and that possession of the tidelands was "a necessary perquisite to the enjoyment of fishing." *Id.* at 620-21. In more recent litigation, we again gave effect to the 1873 executive order as definitively establishing the boundaries of the Lummi reservation, including the order's reservation of tidelands. *United States v. Washington,* 969 F.2d 752, 755-56 (9th Cir. 1992). Notably, in *Washington,* the state took the position that the Lummi reservation extends to the low-tide line and did not claim the tidelands. *Id.* at 753. In this lawsuit, the state has expressly declined to claim ownership of the tidelands and to intervene.

[3] We have remarked before that *stare decisis* "applies with special force to decisions affecting title to land," given the special reliance that such decisions

command. *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951, 960 (9th Cir. 1982); *see also Minnesota* [*Min.*] *Co. v. Nat'l Co.,* 70 U.S. 332, 334 (1865) ("Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change."); *Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). The Lummi and homeowners on Sandy Point have long relied on the fact that the Lummi own the tidelands. Until 1988, Homeowners leased the tidelands from the Lummi, with both sides believing that the Lummi owned the tidelands. We see no reason, then, to overturn 90 years of precedent, especially when the supposed title holder has declined to claim ownership.

Additionally, evaluating the executive order against contemporary case law, we find it sufficient to rebut the presumption of the equal footing doctrine. As the Supreme Court has explained, "the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Idaho,* 533 U.S. at 273 (citing *United States v. Alaska,* 521 U.S. 1, 41-46, 55-61 (1997) (*Alaska (Arctic Coast)*)). Although "disposals by the United States

during the territorial period are not lightly to be inferred," *Holt State Bank,* 270 U.S. at 55, because the two-step test of congressional intent is met, the tidelands did not pass to Washington upon its admission to statehood.

[4] The first part of the test is easily met. Article VII of the Treaty of Point Elliott provides that "[t]he President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit." 12 Stat. at 929. Thus, in ratifying the Treaty, Congress gave the President the discretionary power to alter the boundaries of the reservation;[8] he later exercised these powers by explicitly extending

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[8] Treaties and other agreements with Indians are liberally construed in favor of the Indians. *Choctaw Nation v. United States,* 318 U.S. 423, 431-32 (1943) ("Of course treaties are construed more liberally than private agreements[ ]. . . . Especially is this true in interpreting treaties and agreements with Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people'" (citations omitted)). The President's power to "remove" the tribes from the specified reservations to "such other suitable place . . . as he may deem fit" therefore encompasses the power to expand the boundaries of the reservation, since the President has the discretion to deem an expanded reservation a suitable replacement for the current one and "remove" the tribes from the smaller reservation to the expanded one.

the reservation to the low-water mark, thereby including the tidelands. *Cf. Alaska v. United States,* 545 U.S. 75, 101-02 (2005) *(Alaska (Glacier Bay))* (finding that executive proclamation reserving submerged lands as part of national monument met first prong of congressional intent test).

[5] When Congress admitted Washington to statehood, it was aware that the President's executive order added the tidelands to the reservation. *See Alaska (Arctic Coast),* 521 U.S. at 45 (finding that the President's executive order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands in the Reserve"). And while Congress admitted Washington on an equal footing, 25 Stat. at 679, it also recognized the validity of the executive order reservation by requiring Washington state to "forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes." *Id.* at 677. This proviso was written more broadly than Congress's specific recognition of ownership over the National Petroleum Reserve in *Alaska (Arctic Coast), see* 521 U.S. at 41-42, but a broad congressional statement can still be a clear expression of intent. In *Alaska (Glacier Bay)*, the Supreme Court held that an exception that prevented the transfer of "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" to the state of Alaska was a sufficient indication of intent so as to defeat state title to

submerged lands in the Glacier Bay National Monument. 545 U.S. at 105 (quoting the Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 341 (1958)). As in *Alaska (Glacier Bay)*, Congress made it abundantly clear here that Washington would not have title to the lands in question, thereby satisfying the second step of the congressional intent test.

[6] Historically, the Lummi and other Pacific Northwest tribes have depended heavily on fishing and digging for shellfish as a means of subsistence. *See Stotts,* 49 F.2d at 620-21; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 665-67 (1979). President Grant's reservation of the tidelands thus served to promote the tribe's access to fishing and shellfish, and the welfare of the tribe more generally. Longstanding precedent has established that the tidelands were reserved for the Lummi, and both the tribe and others have relied on this understanding for years. But even were there no such precedent, the executive order reserving the tidelands was promulgated pursuant to congressional authority and subsequently recognized by Congress in a way that indicates a clear intent to prevent title from passing to the state of Washington. We therefore hold that the United States owns the tidelands and holds them in trust for the Lummi.

2.

The problem of riparian and littoral property boundaries is a recurring and difficult issue. These disputes can be especially complicated where the land borders tidal waters, because the waters fluctuate dramatically and because private title claims often have to be balanced against federal and state interests in the ownership and use of the submerged lands. At issue in the Homeowners' second challenge to the trespass claim are two competing common law principles. On the one hand, courts have long recognized that an owner of riparian or littoral property must accept that the property boundary is ambulatory, subject to gradual loss or gain depending on the whims of the sea.[9] *See, e.g., County of St. Clair v. Lovingston,* 90 U.S. 46, 68-69 (1874). On the other hand, the common law also supports the owner's right to build structures upon the land to protect against erosion. *See, e.g., Cass v. Dicks,* 44 P. 113, 114 (Wash. 1896) ("If a landowner whose lands are exposed to inroads of the sea [] . . . erects sea walls or

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[9] While the rights and duties of riparian landowners – those with land fronting a river or stream – can differ from those of littoral landowners – those with property fronting an ocean, sea, or lake – the rules often overlap and sometimes the distinction is elided altogether. *See, e.g., Tusher v. Gabrielsen,* 80 Cal. Rptr. 2d 126, 146-47 (Ct. App. 1998); *Thies v. Howland,* 380 N.W.2d 463, 288 n.2 (Mich. 1985); *but see In re Opinions of the Justices,* 106 A. 865, 868-69 (Me. 1919) (stating that a riparian owner may lower a stream so long as the use is reasonable but that a littoral owner may not draw down a lake below the natural level).

dams for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor . . . [he] is not responsible in damages to the latter, as he has done no wrong having acted in self-defense, and having a right to protect his land." (citation omitted)). In this case, the Homeowners' land has eroded away so dramatically that the ambulatory tideland boundary has reached and become fixed at their shore defense structures. While the Homeowners cannot be faulted for wanting to prevent their land from eroding away, we conclude that because both the upland and tideland owners have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain.

[7] Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume. *See Jefferis v. East Omaha Land Co.,* 134 U.S. 178, 189 (1890); *California ex rel. State Lands Comm'n v. United States,* 805 F.2d 857, 864 (9th Cir. 1986); *United States v. Boynton,* 53 F.2d 297, 298 (9th Cir. 1931). The uplands owner loses title in favor of the tideland owner – often the state – when land is lost to the sea by erosion or submergence. The converse of this proposition is that the littoral property owner gains when land is gradually added through accretion, the accumulation of deposits, or reliction, the exposure of previously submerged

land. *See County of St. Clair,* 90 U.S. at 68-69; *Jefferis,* 134 U.S. at 189; 65 C.J.S. Navigable Waters § 95 (2009). These rules date back to Roman times, and have been noted in Blackstone's Commentaries and many other common law authorities and cases. *See County of St. Clair,* 90 U.S. at 66-67 (citing *inter alia* the Institutes of Justinian, the Code Napoleon, and Blackstone's Commentaries); John M. Gould, A Treatise on the Law of Waters 306-08 (3d ed. 1900) ("Land formed by *alluvion,* or the gradual and imperceptible accretion from the water, and land gained by *reliction,* or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. . . . Conversely land gradually encroached upon by navigable waters ceases to belong to the former owner."); 3 Emory Washburn, A Treatise on the American Law of Real Property 75 (6th ed. 1902) ("[T]he boundary line of an owner's land bordering upon the sea varies with the gradual increase or diminution of quantity by the addition of alluvion, or by the encroachments of the water upon the land, the line of the shore varying accordingly.").

[8] Importantly, the upland owner's right to accretions is a vested right and "rests in the law of nature." *County of St. Clair,* 90 U.S. at 68. It is justified in large part because the upland owner's land is subject to erosion. As the Supreme Court stated in *County of St. Clair,*

> The riparian right to future alluvion is a vested right. It is an inherent and essential

> attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim 'qui sentit onus debet sentire commodum' ['he who enjoys the benefit ought also to bear the burdens'] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.

Id. at 68-69; *see also Nebraska v. Iowa,* 143 U.S. 359, 360-61 (1892) ("Every proprietor whose land is thus bounded [by water] is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (quoting *New Orleans v. United States,* 35 U.S. (10 Pet.) 662, 717 (1836))); *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 326 (1973) ("Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control."), *overruled on other grounds by Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).

[9] By this logic, both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and

upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Some courts have justified the rule of accretion by noting that it is in the interest of the community that land have an owner and be put to "productive use." *See Bd. of Trustees of the Internal Improvement Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 213 (Fla. Dist. Ct. App. 1973); *Brainard v. State*, 12 S.W.3d 6, 18 (Tex. 1999). While this could be seen as supporting the notion that dry uplands should be valued more than tidelands, we decline to hold that the use of uplands is inherently more valuable than the use to which tidelands can be put. As was already noted, the tidelands have played an important role in the Lummi's traditional way of life, and in most other areas, the tidelands are held by the state in trust for the public. *See Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892). These interests are substantial, and the uses they represent are not obviously less "productive." *See Shively v. Bowlby*, 152 U.S. 1, 57 (1894) ("[Lands under tide waters] are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right."). Thus, both the

Lummi and the Homeowners must accept that the ambulatory boundary is "an inherent and essential attribute of the original property," *County of St. Clair,* 90 U.S. at 68, and that both the tidelands and the uplands are subject to diminishment and expansion based on the forces of the sea.

[10] The Homeowners concede that the tideland boundary is ambulatory, but only to a point. According to the Homeowners, once the MHW line intersects the face of their defense structures, the boundary becomes fixed and remains so unless the tide line overtops the structures or recedes. The Homeowners rightly note that the common law permits them to erect shore defense structures on their property to prevent erosion. They contend that they lawfully did just that, building landward of the MHW line, and cannot be liable for the movement of the tideland boundary. In particular, the Homeowners draw support for their position from the common enemy doctrine, which provides that "[a] man may raise an embankment on his own property to prevent the encroachments of the sea, although the fact of his doing so may be to cause the water to beat with violence against the adjoining lands, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses." *Revell v. People,* 52 N.E. 1052, 1059 (Ill. 1898) (quotation marks and citation omitted).

[11] Typically, the common enemy doctrine applies as a defense to nuisance or trespass actions where a property owner has caused surface waters –

the "common enemy" of all landowners – to invade a neighbor's property.[10] *See, e.g., Cass v. Dicks,* 44 P. 113, 114 (Wash. 1896) ("[S]urface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy, against which any one may defend himself, even though by doing so injury may result to others."). The doctrine therefore does not apply here. On the one hand, the injury complained of is not the diversion of water onto the tidelands; rather, it is the physical encroachment of the shore defense structures themselves. With the exception of *Revell,* which held that a waterfront

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[10] Many jurisdictions have dispensed with the doctrine altogether and instead apply a rule of reasonableness, under which "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." *Armstrong v. Francis Corp.,* 120 A.2d 4, 8 (N.J. 1956); *see, e.g., Weinberg v. N. Alaska Dev. Corp.,* 384 P.2d 450, 452 (Alaska 1963); *Bunch v. Coachella Valley Water Dist.,* 935 P.2d 796, 801 (Cal. 1997); *Rodrigues v. State,* 472 P.2d 509, 516 (Haw. 1970); *see generally,* Wendy B. Davis, Reasonable Use Has Become the Common Enemy, 9 Alb. L. Envtl. Outlook J. 1, 9-10 (2004) (noting that 21 states have adopted the "reasonable use" rule). While Washington has retained the doctrine, it has modified the rule so that property owners must exercise due care by "acting in good faith and avoiding unnecessary damage to the property of others," *Currens v. Sleek,* 983 P.2d 626, 629-30 (Wash. 1999), and by making the rule inapplicable to sea water. *Grundy,* 117 P.3d at 1094. It is far from clear, then, that the common enemy rule, as advocated by the Homeowners, is even the dominant view.

property owner had no right to erect structures on submerged land owned by the state, 52 N.E. at 1060, all the cases cited by the Homeowners concern disputes over structures diverting waters onto a neighbor's land, not the maintenance of structures on the neighbor's land. *See Lamb v. Reclamation Dist. No. 108,* 14 P. 625, 626-27 (Cal. 1887); *Miller v. Lezerich,* 49 S.W.2d 404, 406 (Tex. 1932). On the other hand, the rule is inapposite because the water is not acting as a "common enemy" of the parties involved. The tide line is an inherent attribute of the properties at issue, since it dictates where the tidelands end and the uplands begin. That the boundary is ambulatory does not make it a common enemy, since any movement seaward or landward is to the benefit of one party and the detriment of the other. It is unfortunate that the boundary line increasingly has encroached on the Homeowners' property, but they cannot claim that the common enemy doctrine allows them to fix permanently the tideland boundary.

[12] The Homeowners have the right to build on their property and to erect structures to defend against erosion and storm damage, but all property owners are subject to limitations in how they use their property. The Homeowners cannot use their land in a way that would harm the Lummi's interest in the neighboring tidelands. Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do not have

the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation. The Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary and prevent accretion benefitting the Homeowners. Although the shore defense structures may have been legal as they were initially erected, this is not a defense against the trespass action nor does it justify denying the Lummi land that would otherwise accrue to them.

[13] We emphasize that this does not mean property owners cannot erect shore defense structures on their property or take other action to prevent erosion. Nor does it mean that the Homeowners must necessarily remove their structures, if they can reach an agreement with the Lummi Nation and the United States that allows the structures to remain. Rather, we hold only that the Homeowners have no defense to a trespass action because they are seeking to protect against erosion.[11] Once the shore has eroded so

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[11] Amicus curiae Building Industry Legal Defense Foundation ("BILD") argues that such a rule will have dramatically harmful consequences, given the many coastal properties with shore defense structures. This overestimates the reach of our opinion, however. Because of the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. § 1311, the states hold title to most of the tidelands. Most disputes that arise between the states and littoral property owners over tideland boundaries and the use of tidelands are ultimately a matter for state courts to adjudicate under state law. The states, of course, must consider the public interest – not just those of waterfront property owners – in deciding how to manage their tidelands, as they

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dramatically that the property owner's shore defense structures fix the ambulatory boundary, the upland owner cannot expect to permanently maintain the boundary there without paying damages to the tideland owner or working out an agreement with the tideland owner. Homeowners on Sandy Point previously had leased the tidelands from the Lummi, and there is no reason the Homeowners could not similarly seek to negotiate a new agreement now.

3.

It is undisputed that as of the 2002 survey, some of the Homeowners' shore defense structures sat seaward of the MHW line. The Homeowners nevertheless argue that they cannot be liable for trespass because they did not intend the structures to trespass and because the trespass was caused by the erosion of the shore and resulting movement of the boundary, not by the Homeowners.

[14] However, as the district court noted, to be liable for trespass, the Homeowners need not have intended the actual trespass. Rather, the intent requirement is satisfied because the government requested that the encroaching parts of the structures

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already have been doing. As with many property disputes, those between tideland holders and littoral property owners will not be easy to resolve and they may simply require the parties to compromise, even if that means not everyone is entirely satisfied with the results.

be removed, but the Homeowners failed to do so. *See New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 974 (W.D.N.Y. 1983) ("In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made."); *see also* Restatement (Second) of Torts § 161; 75 Am. Jur. 2d Trespass § 19 (2009) ("A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing that the actor or a predecessor in legal interest has placed on the land and failed to remove."). And although the Homeowners did not cause the movement of the boundary line, they can still be liable for the structures even after the boundary moved across the structures. It is enough that the Homeowners caused the structures to be erected and that the structures subsequently rested on the tidelands. *See* Restatement (Second) of Torts § 161, cmts. b, e.

[15] Given that the United States, not Washington, holds title to the tidelands and that the Homeowners cannot permanently fix the tideland boundary, it quickly follows that the Homeowners are liable for trespass. The district court was correct, then, in finding in favor of the United States and Lummi Nation as to the trespass claim.

B.

[16] Turning next to the RHA claim, there are three ways in which a defendant could violate § 10 of the RHA. The first clause of § 10 prohibits the creation of "any obstruction not affirmatively authorized by Congress[ ] to the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403. Clauses two and three respectively make it unlawful to "build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army" or to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." *Id.*

Under the RHA the navigable waters of the United States means "all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state." *Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 753 (9th Cir. 1978); *see also* 33 C.F.R. §§ 322.2(a), 329.4, 329.12(a)(2). Notably, courts have "consistently found [the RHA's] coverage to be broad," *Wyandotte Transp. Co. v. United States,* 389 U.S. 191, 201 (1967); *see also Sanitary Dist. Co. of Chicago v. United States,* 266 U.S. 405,

429 (1925) (calling the RHA "a broad expression of policy in unmistakable terms"), and "read the [RHA] charitably in light of the purpose to be served." *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960).

The Homeowners concede that they do not have authorization to maintain structures in the navigable waters of the United States. Given that at least some of their shore defense structures lie seaward of the MHW line, the issue on appeal is whether the district court properly ruled that the Homeowners had violated § 10 by not removing their shore defense structures from the tidelands.

[17] Although § 10 does not explicitly mention the maintenance of structures in navigable waters, in the sense of keeping structures in place, we have interpreted the RHA as making unlawful the failure to remove structures prohibited by § 10, even if they were previously legal. *See United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000) ("Gateway's assertion that the Corps cannot remove a lawfully erected structure is equally unavailing. . . . the RHA allows the United States to remove structures that were once erected lawfully but subsequently found to be obstructions."). This makes sense in light of the RHA's concern with insuring that navigable waterways remain free of obstruction, because even initially legal structures can subsequently interfere with navigation. *See, e.g., United States v. New York Cent. R.R.*, 252 F. Supp. 508, 511 (D. Mass. 1965) (finding landward remnants of previously legal

bridge an obstruction), *aff'd per curiam,* 358 F.2d 747 (1st Cir. 1966). The Homeowners' structures may have been legal as initially built, but because of the movement of the tidal boundary they now sit in navigable waters and are obstructions.[12]

[18] The Homeowners argue that *Alameda Gateway* is inapplicable, because it concerns the first clause of § 10, and, according to them, the shore defense structures do not interfere with navigation. However, structures violating clauses two or three are presumed to be obstructions under the first clause. *Alameda Gateway,* 213 F.3d at 1165; *Sierra Club v. Andrus,* 610 F.2d 581, 596 (9th Cir. 1979), *rev'd on other grounds sub nom. California v. Sierra Club,* 451 U.S. 287 (1981) (holding that there is no implied private right of action under § 10 and thus declining to reach the merits). That is, clauses two and three have been interpreted as "a legislative enumeration of specific obstructions to navigable capacity that require Corps authorization" to be legal, *Andrus,* 610 F.2d at 594, with the Corps having discretion to "determine what in the particular cases constitute[s] an unreasonable obstruction." *Id.* at 596 (quoting *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929)). There

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[12] The Corps' regulations confirm that structures may be obstructions without regard to how the structures came to be in navigable waters. The Corps generally requires a permit "for structures and/or work in or affecting navigable waters," without reference to whether the structure is being initially erected in navigable waters or has already been sitting there. 33 C.F.R. § 322.3(a).

is no need, then, for the Corps or the courts to determine first that the Homeowners' structures obstruct navigable capacity, since the structures obviously qualify as a "breakwater, bulkhead, . . . or other structure" under clause two and modify the course, location, condition, and capacity of the Strait under clause three. 33 U.S.C. § 403. The Homeowners are therefore required to have Corps authorization; because they have maintained their structures in the tidelands without such authorization, they can be liable under the RHA.

BILD argues that under the RHA navigable waters do not extend to the MHW line in its "unobstructed, natural state," because *Leslie Salt* stated that this jurisdictional line "is dictated by the principle . . . that one who develops areas below the MHW line does so at his peril." 578 F.2d at 753. According to BILD, since the Homeowners claim they built above the MHW line, *Leslie Salt* is inapplicable. On the one hand, whether navigable waters reach the MHW in its unobstructed state or in its obstructed state is irrelevant here, because the Homeowners are liable either way. The topographic survey maps submitted by the government show that at least some rip rap from the shore defense structures sits below the MHW line, and that rip rap has not so obstructed the movement of the tide that it is prevented from flowing landward of this scattered rip rap. So even assuming an obstruction could prevent the movement of the MHW line under the RHA, the Homeowners have still violated clause two of § 10.

On the other hand, this argument ignores the RHA's central concern, which is to insure that the nation's waterways remain navigable and free of obstruction. The nation's navigable waterways, of course, can change, and with it the Corps' jurisdiction. *See, e.g., Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) (finding Corps had jurisdiction over subsequently flooded area). Structures that were previously above the MHW line can become subject to Corps' regulation because the tide line has moved, and if those structures prevent the MHW line from achieving its unobstructed, natural state they can pose a serious risk to navigation. A structure should not be exempt from regulation because it so significantly displaces navigable waters that the waters are permanently penned in. Just as one who develops below the MHW line "does so at his peril," those who build too close to the MHW line also run the risk that their structures eventually may become obstructions and be subject to regulation by the Corps.[13]

[19] The Homeowners' structures additionally violate clause three of § 10, without regard to whether or not one considers the waters in their unobstructed state. In certain circumstances a structure

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[13] As in *Leslie Salt,* we express no opinion as to whether or at what point the government may be estopped from asserting its jurisdiction because land has long ago been filled in, as was the case in *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610-11 (3d Cir. 1974). *See* 578 F.2d at 753. There is no indication here that the United States excessively delayed its enforcement efforts.

or activity can still be a violation of clauses one or three of § 10 even if the structure or activity is not located in navigable waters. *See United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1298 (5th Cir. 1976). As the Fifth Circuit has put it, for the most part § 10 has "no locality assigned to its prohibitions." *Id.*

> It prohibits any obstruction to navigable capacity. There is no suggestion that an obstruction whose source is above [the MHW line] escapes prosecution. It prohibits the alteration or modification of the course, condition, location or capacity of a navigable water. There is not the slightest intimation that an alteration or modification whose source is above [the MHW line] is any less an alteration or modification. There is nothing in the language of the statute nor the logic of its implementation which creates this barrier beyond which the Corps is ubiquitously powerless. Indeed, such a limitation would thwart the design of the statute.

Id. at 1298-99; *see also* 33 C.F.R. § 322.3(a) ("Structures or work outside [the navigable waters of the United States] are subject to [§ 10] if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity."). Under clause three, even though the tide line does not extend past the Homeowners' shore defense structures because the Homeowners have successfully prevented the Strait from advancing landward, the structures "alter or modify the course,

location, condition, or capacity of" the Strait, since the flow of the waters is limited by the structures. 33 U.S.C. § 403. The Homeowners are therefore liable on this alternative basis as well.

[20] Because the Homeowners have maintained at least part of their shore defense structures below the MHW line, and because the structures alter the course, location, condition, or capacity of the Strait, they are required to obtain Corps' authorization or face liability. Contrary to the Homeowners' claim, they need not have intended to violate the RHA; it is sufficient under *Alameda Gateway* that they intentionally erected structures that became obstructions. *See* 213 F.3d at 1167. The district court therefore appropriately found liability, and its imposition of an injunction under § 12 of the RHA, 33 U.S.C. § 406, was not an abuse of discretion, given the standard for injunctions under § 12. *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) ("No balancing of interest or need to show irreparable injury is required when an injunction is sought under § 12 to prevent erection or seek removal of an unlawful structure.").

C.

[21] The CWA prohibits the discharge of any dredged or fill material into "navigable waters" unless authorized by the Corps. *See* 33 U.S.C. §§ 1311, 1344. However, the scope of the Corps' regulatory authority under the CWA and RHA is not the same,

in part because the definition of "navigable waters" is broader under the CWA and encompasses all "waters of the United States." 33 U.S.C. § 1362(7); *Leslie Salt*, 578 F.2d at 754-55. Instead of using the MHW line, the Corps' regulations define its CWA jurisdiction over tidal waters by reference to the "high tide line," 33 C.F.R. § 328.4(b)(1), which, in turn, is defined as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide."[14] 33 C.F.R. § 328.3(d).

The district court found on summary judgment that the Nicholsons had violated the CWA, because, in the course of reconstructing their shore defense structures, they discharged fill material below where the high tide line would fall in its unobstructed, natural state without a permit. In so ruling, the district court again relied on the holding from *Leslie Salt* that "the MHW line is to be fixed in accordance with its natural, unobstructed state." 578 F.2d at 753.

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[14] Locally, the policy of the Seattle District of the Corps has been to draw the high tide line at the mean higher high water (MHHW) line, which is calculated by averaging over 18.6 years the highest of the two high tides that occur in a day and projecting that line onto the shore. *Leslie Salt*, 578 F.2d at 746. Because the two daily Pacific coast tidal cycles can vary greatly in height, the difference between the MHHW line and the MHW line – the average of both high tides occurring in a day – can be relatively large on the west coast of the United States. *Id.* In fashioning a remedy for the CWA violation, Judge Leighton took the Corps' local enforcement policy into account, but, contrary to the government's position, this does not necessarily conflict with what Judge Rothstein found on summary judgment.

However, while *Leslie Salt* applied this rule to the definition of navigable waters under the RHA, it was more circumspect as to what the limits of navigable waters and the Corps' jurisdiction are under the CWA. The district court in *Leslie Salt* had held that navigable waters under the CWA extended to the MHHW line in its unobstructed, natural state. *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096, 1103 (N.D. Cal. 1976). But we declined to hold that the waters of the United States extended to all places the water would theoretically reach, partially out of concerns that such a ruling swept too broadly and unnecessarily included "fast land" or "improved solid upland." *See Leslie Salt,* 578 F.2d at 754. Since we could decide *Leslie Salt* by addressing only whether the particular waters in question were subject to regulation by the Corps, we did not address the ultimate question of what constitutes the outer limit of the Corps' CWA jurisdiction. *Id.* at 756.

[22] This case presents more squarely the question of how far the Corps' CWA jurisdiction extends. *Leslie Salt* addressed whether certain waters diked off from the San Francisco Bay constituted waters of the United States. 578 F.2d at 756. Here there is a question as to whether any water actually reaches the area at issue, and if not, whether it is still subject to regulation by the Corps. The parties in *Leslie Salt* agreed that the Corps' jurisdiction does not extend to property that was dry, solid upland as of the date of the passage of the CWA. *See id.* at 754. In the same vein, the Corps has stated that it does not

intend to assert jurisdiction over lands that once were submerged but which have been transformed into dry land. *See* 42 Fed. Reg. 37128 (July 19, 1977). While we do not purport to decide the full extent of the Corps' CWA regulatory authority, we find this approach persuasive. Any discharge on fast land would not actually be in the waters of the United States, and it would be potentially unfair to occupants of such land to hold them to the strictures of the CWA if the land has long been dry. Even if land has been maintained as dry through artificial means, if the activity does not reach or otherwise have an effect on the waters, excavating, filling and other work does not present the kind of threat the CWA is meant to regulate.

[23] This does not mean that fast land cannot subsequently become submerged by the waters of the United States. As the Corps' regulations acknowledge, gradual changes to the bed of a body of water will change the boundaries of the waters of the United States. 33 C.F.R. § 328.5. But if land was dry upland at the time the CWA was enacted, it will not be considered part of the waters of the United States unless the waters actually overtake the land, even if it at one point had been submerged before the CWA was enacted or if there have been subsequent lawful improvements to the land in its dry state.[15] In short,

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[15] This would not change the fact that waters which were in the past navigable are still considered such, even if they are no longer navigable in fact. *See United States v. Appalachian Elec.*

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in such a situation, the waters of the United States are demarcated by the reach of the high tide line, but not as it would be in its unobstructed, natural state if the fill or obstruction was in place at the time the CWA was enacted or if there was a legally authorized filling or improvement done after the enactment of the CWA.

[24] Applying that boundary here, it is unclear from the evidence presented at summary judgment whether the high tide line actually reached the area where the Nicholsons excavated and filled. Pictures of the bulkhead reconstruction show that the rip-rap revetment seaward of the bulkhead may have successfully prevented the tide from reaching the area under construction. The construction diagrams show an intent to excavate to a depth that would be below the high tide line if one ignored the existence of the

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Power Co., 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so."); 33 C.F.R. § 328.3(a)(1). We also reiterate *Leslie Salt's* admonition that the full extent of the Corps' CWA jurisdiction over waters of the United States "is in some instances not limited to the MHW or the MHHW line." *Id.* at 742. For example, where there are adjacent wetlands or intermittent streams, the Corps still has jurisdiction, even though these areas are beyond the normal ebb and flow of the tide. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985); *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007). Additionally, some discharges on dry land can be CWA violations. *See Leslie Salt*, 578 F.2d at 753 n.12 (citing *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), as an example of a discharge above MHHW line that violated CWA).

revetment. But if the revetment was in place prior to the enactment of the CWA or legally built on dry land after the passage of the CWA, then it must be considered as it actually exists. While the parties seem to agree that the revetment was built in 1982 by the Nicholsons' predecessor in interest, on summary judgment the government did not present evidence showing that the revetment was not lawfully built on dry land beyond the reach of the high tide line. There was also no evidence that during the reconstruction of the bulkhead, the Nicholsons placed additional rip rap seaward of the revetment or that their activities otherwise led to the discharge of material below the high tide line, as it actually existed. The government therefore did not carry its burden of showing that the Nicholsons had violated the CWA by discharging material into waters of the United States. Accordingly, we reverse the grant of summary judgment on this claim and remand for further proceedings.

Although the CWA's jurisdictional reach is generally broader than the RHA's, the reversal here is explained by the RHA's concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other. Since the two laws serve different purposes, their regulatory powers will diverge in some circumstances, as is the case here. Under the RHA, it is appropriate to ignore an obstruction's ability to stop the flow of navigable water, because the purpose of the RHA is precisely to prevent or remove obstructions to navigable waters. The Homeowners' structures clearly impinge on the

capacity of the Strait of Georgia and portions of them sit within navigable waters; they are therefore obstructions. The CWA, on the other hand, is designed to restore and maintain the integrity of the nation's waters, which it does by limiting the discharge of pollutants into the waters. *See* 33 U.S.C. § 1251(a). The Nicholsons' activities in reconstructing their bulkhead, however, would not involve a discharge into waters of the United States if conducted solely on fast land. The revetment fronting their bulkhead may have prevented the MHHW line from reaching the construction work – and thereby prevented a discharge into navigable waters – while at the same time obstructing those waters. It is perfectly consistent, then, that the Homeowners could be liable under the RHA while the Nicholsons may not be liable under the CWA.

D.

Finally, for the court to award attorney's fees and costs under the EAJA, it must be shown that (1) the party seeking fees is the prevailing party; (2) the government has not met its burden of showing that its positions were substantially justified or that special circumstances make an award unjust; and (3) the requested fees and costs are reasonable. *See Perez-Arellano v. Smith,* 279 F.3d 791, 793 (9th Cir. 2002).

[25] To be a prevailing party, the party must have received an enforceable judgment on the merits

or a court-ordered consent decree. *Id.*; *see Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) ("[E]nforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." (citation omitted)). The Milners and Bennett/Boyd stipulated to the government's dismissal, without prejudice,[16] of the CWA claims against them. However, although a defendant may no longer have a claim pending against him or her upon dismissal, a dismissal without prejudice does not materially alter the legal relationship of the parties, because the defendant remains subject to the risk of re-filing. *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008); *Cadkin v. Loose*, 569 F.3d 1142, 1149 (9th Cir. 2009). Although *Oscar* and *Cadkin* concern fee-shifting statutes other than the EAJA, they turn on the meaning of the term "prevailing party" and govern our interpretation here. *See Perez-Arellano*, 279 F.3d at 794 (noting that *Buckhannon* "sweeps . . . broadly and its reasoning is persuasively applicable to an award of attorney's fees under the EAJA"); *Oscar*, 541 F.3d at 981 (relying on *Buckhannon* to determine whether a defendant is a prevailing party); *Cadkin*, 569 F.3d at 1149 (same). We therefore

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[16] Since the stipulation did not state that the dismissal was with prejudice, it was without prejudice. Fed. R. Civ. Proc. 41(a)(1)(B).

conclude that the Milners and Bennett/Boyd are not prevailing parties and are not entitled to attorneys' fees under the EAJA.

IV.

Although this particular dispute has been ongoing for some years now, for an even longer period of time, the Homeowners on Sandy Point had an agreement with the Lummi Nation to lease the tidelands. This allowed the upland owners to construct and maintain bulkheads, rip rap, and other shore defense structures on the tidelands in order to protect their property. The Sandy Point Homeowners had an opportunity to renew the lease for an additional 25 years, the maximum lease term allowed for Indian trust lands. 25 U.S.C. § 415. Additionally, throughout this litigation the Lummi have expressed a desire to negotiate a new agreement, and at least before commencement of this suit, the United States indicated that its concerns would be satisfied if the Homeowners entered into agreements with the Lummi.

This action was avoidable. Perhaps the parties still will be able to reach an amicable settlement. However, because the Homeowners have so far been unable or unwilling to negotiate an agreement with the Lummi, we must pass on the merits of the dispute. For the reasons set forth above, we affirm the district court's decisions on the trespass and RHA claims, and its decision not to grant fees under the

EAJA. We find that the government did not carry its burden on the CWA claim against the Nicholsons; we therefore reverse on that claim.

Each party is to bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

United States District Court
WESTERN DISTRICT OF WASHINGTON

FRCP 54(b)
JUDGMENT IN A CIVIL CASE

(Filed Sep. 20, 2005)

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation

v.

MARY D. SHARP, KEITH E. MILNER and SHIRLEY A. MILNER, IAN C. BENNETT and MARCIA A. BOYD.

CASE NUMBER:
C01-0809RBL

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Upon the Stipulation of the parties, the Court has determined that there is no just reason for delay and upon an express direction for the entry of judgment, FRCP 54(b), it is **ORDERED** that

Judgment be entered in favor of Plaintiff United States of America and Plaintiff-Intervenor Lummi Indian Nation against only Mary D. Sharp, Keith E. Milner and Shirley A. Milner, Ian C. Bennett and Marcia A. Boyd.

DATED: SEPTEMBER 20, 2005

/s/ BRUCE RIFKIN
Clerk

/s/ Jean Boring
(By) Deputy Clerk

United States District Court
WESTERN DISTRICT OF WASHINGTON

JUDGMENT IN A CIVIL CASE

(Filed Jun. 14, 2005)

UNITED STATES OF AMERICA,
on its own behalf and as trustee
on behalf of the Lummi Nation

v.

KEITH E. MILNER
and SHIRLEY A. MILNER,

CASE NUMBER:
C01-0809RBL

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Court has determined that there is no just reason for delay and upon an express direction for the entry of judgment, FRCP 54(b), it is **ORDERED** that

Based on the Findings and Conclusions, the court in its discretion Orders as Follows:

(1) The Nicholsons shall pay a penalty of $1,500.00 for their previously adjudicated violation of the Clean Water Act.

(2) The Nicholsons shall, within 90 days of the date of the order, remove the riprap which is located below the MHHWL as shown on the Government's 2002″ survey, Exhibit A-40, UNLESS they apply for and obtain the

necessary "after the fact" CWA permit from the Corps. If an application is filed within 90 days of the date of this Order, this injunctive portion of the order will be stayed until 60 days after that application is ruled upon by the Corps.

(3) This Order shall be stayed pending appeal of this final Order, on the condition that the Nicholsons continue to pay the Lummi Nation fair market value for their use of the tideland below MHWL.

DATED: JUNE 14, 2005

/s/ BRUCE RIFKIN
Clerk

/s/ Jean Boring
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiffs, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants, THE LUMMI NATION, Intervenor-Plaintiff.	NO. C01-809R ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT RE: TRESPASS AND RHA CLAIMS (Filed Jun. 18, 2003)

THIS MATTER comes before the court on Plaintiffs' motions for summary judgment. Having reviewed the pleadings filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

Defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, and Ian C. and Marcia A. Boyd own beachfront property

on Sandy Point, in Whatcom County, Washington.[1] Defendants' property is fronted by various shore defense structures that allegedly encroach on tidelands on the Strait of Georgia that are owned by the United States in trust for the Lummi Nation. The United States also alleges that these structures are being maintained in violation of the Rivers and Harbors Act ("RHA").[2] Together, the United States and Lummi Nation move for summary judgment on the trespass claim. The United States moves separately for summary judgment on its RHA claim.

II. DISCUSSION

A. Summary judgment standard

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While the moving party has the initial burden to establish the absence of any genuine issues of fact, the nonmoving party "must do more than simply

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[1] Defendants Harry F. Case and Donald C. and Gloria Walker are not involved in this motion as they have reached a settlement in principle with the government. That settlement, however, has not yet been approved by the Assistant Attorney General. Consequently, the United States reserves the right to move against these defendants in the future.

[2] A third cause of action under the Clean Water Act is not at issue in these motions.

show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the nonmoving party must respond by "set[ting] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec.*, 475 U.S. at 587.

B. Liability for trespass

The parties agree that the federal law of trespass applies in this case. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994) (federal law applies to trespass cause of action protecting Indian lands); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985). That law generally comports to the Restatement of Torts. *See United States v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement (First) of Torts for operative definition of federal trespass); *U.S. v. Osterlund*, 505 F. Supp. 165, 167 (D.C. Colo. 1981). Under the Restatement, a person trespasses when he "intentionally . . . causes a thing [to enter another's land] . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove." *Restatement (Second) of Torts* § 158.

In the present case, uncontested topographic maps demonstrate that as of January 2002, portions of Defendants' shore defense structures were seaward

of the line of mean high water, which this court has determined to be Defendants' boundary line. Ex. 1, United States Mot. Summ. J.; Order Granting United States' and Harry F. Case's Motion for Partial Summary Judgment at 6 (Dec. 16, 2002). Despite having received notice from the government that these structures are on United States land, Exs. 3-10, United States' Mot. Summ. J.,[3] Defendants have not removed them. Nor do Defendants present any specific evidence that the shore defense structures are not currently encroaching on the government's land. Instead, Defendants merely state in a conclusory fashion that since January 2002, the boundary has shifted such that their shore defense structures do not currently encroach. Absent any such specific evidence, however, Defendants fail to create a genuine issue of fact as to whether the shore defense structures are currently encroaching. *Matsushita Elec.*, 475 U.S. at 586 (nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

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[3] Defendants object to these exhibits, which consist of letters from the Army Corps of Engineers and the Department of Justice to individual defendants and excerpts of various Defendants' depositions, as being inadmissible hearsay and improperly authenticated. These items, however, are not hearsay as they are not offered for the truth of the matter that Defendants are trespassing but rather that they received demands by the government to remove the allegedly offending structures.

Instead, Defendants attempt to persuade the court that they cannot be held liable for trespass because they never intended their shore defense structures to encroach onto the tidelands.[4] According to Defendants, the ambulatory nature of the boundary was the cause of the trespass. Defendants liken their situation to the party in a Restatement illustration who piles logs on his land by the side of a stream well above the high-water mark, which are subsequently carried away by an unprecedented freshet. In the illustration, that party is not liable to a party down-stream on whose lands the logs are deposited. *Restatement (Second) of Torts,* § 166 ill. 3. According to Defendants, all of their shore defense structures were originally placed on their own property with subsequent natural events creating the trespass.

Defendants, however, overlook the fact that to be liable, they need not have necessarily intended the actual trespass but that it is enough that they (or their predecessors[5]) acted with knowledge that constructing the shore defense structures would, with substantial certainty, result in entry of portions of the structures onto the tidelands. *Id.* § 158 cmt. i. In the

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[4] Defendants have failed to persuade the court with this argument on at least two previous occasions.

[5] The Defendants are liable for trespass even in the case where their predecessors tortiously placed the structures and the Defendants fail to remove them. *Restatement (Second) of Torts* § 161(2).

present case, as littoral owners, Defendants took their property "with the knowledge that the boundary may change by accretion or reliction." *Michaelson v. Silver Beach Improvement Ass'n*, 173 N.E.2d 273, 278 (Mass. 1961). Defendants, therefore, are more like "one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands," *Restatement (Second) of Torts* § 158 cmt. i, than they are like one who piles logs in the face of an *unprecedented* freshet.[6]

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[6] Defendants contend that they are not liable for trespass under the common enemy doctrine. Under that doctrine, a landowner is entitled to build structures to repel the erosive effects of water. A landowner who builds such structures is generally not held liable for trespass when the consequences and effects of those structures injure another's property. That is not the case at bar, however, because Defendants' shore defense structures themselves are physically located on the government's property. Under the common enemy doctrine, a landowner is simply not entitled to enter onto another's land in order to build or maintain his defensive structures.

Similarly, the cases that Defendants amass for the proposition that there can be no trespass when acts taken on one's own property cause unintended harm to another's property are inapposite. *See Cannon v. Dunn*, 700 P.2d 502 (Ariz. 1985); *Hicks v. Drew*, 49 P. 189 (Cal. 1897); *Schulze v. Monsanto Co.*, 782 S.W.2d 419 (Mo. App. 1989). As above, none of these cases sanction an actual physical encroachment but rather only consider a "constructive" trespass whereby affects and consequences cause injury to land.

Defendants also overlook the fact that they have failed to remove the encroaching parts of the shore defense structures even after the government requested them to do so. In such a situation, the intention element is satisfied. *New York State Energy Research and Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 974 (W.D.N.Y. 1983) ("In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made."). Accordingly, Defendants are liable for trespass.

C. Liability under RHA

Section 10 of the RHA makes it unlawful "to build or commence the building of any . . . breakwater, bulkhead . . . or other structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." Section 10 also makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403.

Courts have interpreted Section 10 to also make unlawful the maintenance of structures restricted by

the Act.[7] *United States v. Alameda Gateway, Ltd.*, 953 F. Supp. 1106, 1110 (N.D. Cal. 1996) ("To deem the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in maintaining unimpeded access to the navigable waters of the United States."); *see also United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000) (holding that the RHA allows the United States to remove structures that were once erected lawfully but subsequently found to be obstructions). Given that Defendants are maintaining the structures (i.e. they have not removed

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[7] Defendants contend that they cannot be liable under the RHA because they did not intend to obstruct any navigable water or build any structure in a navigable water. Their citation to *U.S. v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) and *United States v. Bigan*, 274 F.2d 729 (3d Cir. 1960) for the proposition that the RHA requires some intent and active contribution to the erection of the obstruction is unpersuasive in light of recent Ninth Circuit case law.

A similar argument to Defendants was rejected by the court in *United States v. Alleyne*, 454 F. Supp. 1164 (D.C.N.Y. 1978). In that case, the court clarified the nature of the "intent" needed to be liable under Section 10. According to the court, "it is [not] necessary that the purpose be to create an obstruction, but that such a result is reasonably to be apprehended from the acts actually intended wholly irrespective of whether or not there was a design to create an obstruction to navigation." 454 F. Supp. at 1171 (quoting *United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240, 241 (D. Conn. 1926). Consequently, all that is necessary is that the obstruction to navigation be "reasonably foreseeable." *Id.* In the present case, it was reasonably foreseeable that erosion would one day impact the shore defense structures so that they would be located seaward of MHW and be considered obstructions to navigation.

them), they are liable under the RHA for those parts of the structures that are below MHW. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (holding that "in tidal areas, 'navigable waters of the United States,' as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state"). Furthermore, the structures also modify the course, location, and condition of a navigable water.

As demonstrated by the topographic maps submitted by the government, as of January 2002, parts of Defendants' shore defense structures lie seaward of MHW in its natural and unobstructed state. Consequently, the Defendants are liable for violations of the RHA.[8]

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[8] Defendants misread Section 10 to require a showing that the shore defense structures actually obstruct the navigable capacity of the Strait of Georgia. Instead, the structures listed in the second and third clauses of Section 10 (i.e. bulkheads, breakwaters, and other structures) "are presumed to be obstructions to navigable capacity. . . . When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates Section 10 if he has not first sought and obtained a permit from the Corps of Engineers." *Sierra Club v. Andrus*, 610 F.2d 581, 594-95 (9th Cir. 1979), *rev'd other grounds sub nom. California v. Sierra Club*, 451 U.S. 287 (1981). "[T]o fall within the prohibition of clause 2, it need only be shown that the subject in question is one of those enumerated in Section 10." *United States v. Boyden*, 696 F.2d 685, 688 (9th Cir. 1983); *see also United States v. Joseph G. Moretti Inc.*, 478 F.2d 418, 429 (5th Cir. 1973) ("any argument that the filling of navigable waters

(Continued on following page)

D. Remedy

Plaintiffs seek an injunction against Defendants to remove any part of the shore defense structures that lie below MHW, having waived damages. Such an injunction is available for both the trespass and the RHA violation. 33 U.S.C. § 406 (injunction available to remove structures erected in violation of Section 10 of the RHA).

Defendants urge that any injunction from this court be only for them to apply for after-the-fact permits for the shore defense structures. Despite having some flexibility in shaping the scope of relief, *United States v. Illinois Terminal R.R. Co.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980) ("The federal courts have not limited enforcement of the River and Harbor Appropriation Act to the criminal and injunctive remedies provided in § 406. . . . Congress . . . has provided enough federal law in (33 U.S.C. § 403) from which appropriate remedies may be fashioned even though they rest on inferences."),[9] the court declines to issue such an injunction. First, such an injunction would not remedy the trespass. Second, regulations

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does not reduce navigable capacity of the filled waterway and thereby constitute an obstruction within the meaning of § 403 borders on the frivolous.").

[9] That flexibility is limited, however, to seeking only criminal penalties or some form of an injunction as "the Corps does not have the authority to compensate parties injured by . . . illegal activities." *Potomac River Ass'n, Inc. v. Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975).

authorizing such after-the-fact permits were rescinded by the Corps in 1977. 42 Fed. Reg. 37,122, 37,133 (July 19, 1977) (repealing 33 C.F.R. § 209.120, which included a provision, Section 209.120(c)(iv), for granting after-the-fact permits). Accordingly, if the court issues an injunction, it must be for the removal of the shore defense structures.

Under the RHA, to obtain an injunction, the government need not show irreparable injury and the court need not balance any interests. *United States v. Stoeco Homes Inc.*, 498 F.2d 597, 611 (3d Cir. 1974) ("No balancing of interest or need to show irreparable injury is required when an injunction is sought under § 12 to prevent erection or seek removal of an unlawful structure.") (dicta); *United States v. Ciampitti*, 583 F. Supp. 483, 498 (D.N.J. 1984) (citing *Stoeco Homes*); *United States v. Alleyne,* 454 F. Supp. 1164, 1170 (D.C.N.Y. 1978); *United States v. Underwood*, 344 F. Supp. 486, 494 (D.C. Fla. 1972). Consequently, the only remaining equitable considerations in issuing an injunction are (1) the nature of the interest to be protected, (2) any unreasonable delay in initiating the action, (3) any related misconduct on the government's part, and (4) the practicability of framing and enforcing the injunction. *Restatement (Second) Torts* § 936(1); *see also United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976) ("The degree and kind of wrong and the practicality of the remedy

must be considered in the formulation of that remedy.").[10]

In the present case, it is largely undisputed that the shore defense structures have negative environmental consequences. Johannessen Decl., Gov't Ex. 12 at 86:18-87:8 (negative effects of Defendants' shore defense structures include increased scouring of the beach in front of the structures, increased wave turbulence, a coarsening of the beach that tends to displace potential surf smelt spawning areas, and reducing sediment downdrift that nourishes beach habitats to the south of the structures). In light of the violation of the RHA, an injunction to remove the structures seaward of MHW is appropriate.[11] As the trespass claim is coextensive with the RHA claim, an injunction under Section 406 makes unnecessary a

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[10] The court finds that there was no unreasonable delay by the government. Nor has the government engaged in any related misconduct.

[11] In fashioning the remedy, the court finds *United States v. Sunset Cove, Inc.*, 514 F.2d 1089 (9th Cir. 1975), instructive. In that case, a developer constructed riprap below MHW in violation of 33 U.S.C. § 403 along a shoreline with an ambulatory boundary. The developer, much like the Defendants in the present case, installed the riprap to protect against erosion. The district court, having found a violation of Section 403, issued an injunction for the developer to remove *all* of the fill. In affirming the injunction, the Ninth Circuit modified it so that the defendants would only have to remove enough riprap to "permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions." 514 F.2d at 1090.

remedy for the trespass claim given the government's waiver of all damages.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment [docket no. 224-1 & 231-1] are GRANTED. It is hereby adjudged and ORDERED that:

(1) Defendants shall promptly remove all rock, riprap, and other shore defense structures that are located seaward of MHW as that line is determined on the government's January 2002 survey. Such removal shall be supervised by the Chief of Engineers of the Army Corps of Engineers or his designee.

(2) As MHW moves up and down the shore, Defendants shall promptly, at the request of the government, remove all rock, riprap, and other shore defense structures that become located seaward of MHW, as that point is determined by subsequent surveys. Such removal shall be supervised by the Chief of Engineers of the Army Corps of Engineers or his designee.

(3) The government shall pay for any future survey establishing MHW for the purposes of this order. If such survey reveals that certain structures are located seaward of MHW, any defendant whose property is fronted by those structures shall jointly and severally compensate the United States for the cost of that survey.

(4) At anytime, the government can remove any structures located seaward of MHW and obtain joint and several compensation from the Defendants whose property is fronted by the offending structures.

DATED at Seattle, Washington this 16th day of June, 2003.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiffs, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants. THE LUMMI NATION, Intervenor-Plaintiff.	NO. C01-809R ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ARRESTING LANDWARD MOVEMENT OF BOUNDARY (Filed Feb. 11, 2003)

I. BACKGROUND

This case involves changes in the beach on Sandy Point in Whatcom County, Washington and the alleged trespass of shore defense structures onto land held by the United States in trust for the Lummi Nation. Defendants own properties that are bounded on one side by the sea. When property is bounded by water, that boundary is ambulatory, constantly changing location in response to erosion and accretion. *New Jersey v. New York*, 523 U.S. 767, 784 (1998). In the present case, the court has in fact already held that the seaward boundary of Defendants' properties, marked by mean high water, has always remained ambulatory. Order Granting United

States' and Lummi Nation's Motion for Partial Summary Judgment (Jan. 24, 2003); Order Denying Motion for Reconsideration (Feb. 6, 2003).

On January 30, 2003, this court heard argument from the parties on whether an artificial structure such as a seawall or bulkhead and riprap can "fix" the landward movement on the shore of an ambulatory boundary. For the purposes of this ruling, the court assumes that the bulkheads and riprap fronting Defendants' properties were initially placed *above* mean high water such that they were originally located wholly on Defendants' properties. Furthermore, the court assumes that erosion alone has caused the landward creep of the mean high-water mark so that it currently is located on the face of these structures.[1]

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[1] Were these assumed facts different, the matter would be easily resolved. For instance, it cannot be disputed that artificial structures placed *below* mean high water do not affect the location of the mark on the shore. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (1978) (when obstructions are placed below MHW, "the MHW line is to be fixed in accordance with its natural, unobstructed state"). It can also not be disputed that where authorized filling has occurred, the tidal boundary is marked at the face of the authorized fill. 91 A.L.R.2d 857 §2[b] (1963) (citing cases holding that expressly permitted or authorized reclamation and filling of adjacent shore creates title in the newly filled land in the riparian proprietor). The present facts assume that structures were originally placed above MHW and that MHW impacts those structures only as a result of erosion.

The court, having reviewed the pleadings filed by the parties and having heard oral argument, rules as follows.

II. DISCUSSION

A. Tidelands and the conflict of private rights

Tideland ownership is one of the more often contested issue [sic] in American property jurisprudence. Easily filled, tidelands are often encroached on by adjacent upland owners. Whether the upland owner fills the tidelands and claims them as his own, or whether he constructs piers, wharves, or other structures on or over them, in each case, the upland owner uses the land without the permission of the tideland owner.

Otherwise straightforward and simple trespass and purpresture actions are complicated by the fact that the boundary between tidelands and uplands is ambulatory. Such a boundary is constantly displaced according to the rules of erosion and accretion, which give title to accreted land to upland owners and title to eroded land to tideland owners. 3 *Washburn on Real Property* 65 (5th ed. 1887) ("the boundary-line of an owner's land bordering upon the sea varies with the gradual increase or diminution of quantity by the addition of alluvion, or by the wasting away before the action of the water in its encroachments upon the land, the line of the shore varying accordingly").

Dating back to Roman times,[2] the right established by these rules "rests in the law of nature . . . the same with that of the owner of a tree to its fruits and of the owner of flocks and herds to their natural increase." *County of St. Clair v. Lovingston*, 90 U.S. 46, 69 (1874). Its foundation is the maxim "*qui sentit onus debet sentire commodum*" – he who bears the burden of a thing ought also to experience the advantage arising from it. *Id.* In the present case, then, it is a natural right of both the Lummi Nation and the Defendants to have an ambulatory boundary.

At present, though, Defendants' ambulatory boundary is an unsatisfactory one. Much of the beachfront that had previously stood between winter storms and their homes has been washed away. Defendants seek to exercise their right to protect their property from the ravages of the sea, a right which they claim is as equally fundamental as Plaintiffs' right to an ambulatory boundary. *See, e.g., Chesapeake & Ohio Ry. Co. v. Harris Stanley Coal & Land Co.*, 56 F. Supp. 849, 851 (D.C. Ky. 1944) ("There is a fundamental rule of law that an individual has a right to use his property as he sees fit without interference from his neighbors."); *Jubilee Yacht Club v. Gulf Refining Co.*, 140 N.E. 280, 281

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[2] *See* J. Inst, Lib. II, Tit. I, § 20 ("the alluvial soil added by a river to your land becomes yours by the law of nations"). The rules of accretion can be found in the Napoleonic Code, the law of Spain, and English law. *See County of St. Clair v. Lovingston*, 90 U.S. 46, 66-67 & nn.32-39 (1874).

(Mass. 1923) ("The building of fences, walls or other structures, or making excavations on [one's] own land ordinarily is within the absolute right of the owner of a fee without reference to the incidental injury which may thereby be caused to his neighbor."). Defendants contend that, according to these cases, they are entitled to construct riprap and sea walls on their own property with the intent of protecting that property from an encroaching sea despite the consequences to Plaintiffs. 1 *Wood on Nuisances* 675, § 494 (3d ed.) ("Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defenses, for the protection of his land from the inroads of the sea, although by doing so, he may cause the sea to flow with greater violence against the land of his neighbor, and render it necessary for the latter to protect himself by the erection of similar sea defenses.").

Defendants' argument leads to unacceptable consequences in the present case. Here, Defendants' shore defense structures do not result merely in incidental injury. Rather these structures deny the United States and the Lummi Nation land that would otherwise accrue to them through erosion. As stated above, that land is a natural right which cannot be abrogated by the Defendants' need to maintain their own property. In purchasing property on the shore, Defendants accepted certain rules including gains through accretion and losses through erosion. Having played by those rules for many years, Defendants cannot now change those rules unilaterally in their

own favor without compensating the United States and Lummi Nation for their loss. By artificially stopping erosion that would otherwise occur, Defendants injure Plaintiffs, something that Defendants cannot do free of liability. *Turner v. Tuolumne County Water Co.*, 25 Cal. 397, 403 (Cal. 1864) ("While the defendant had an undoubted right to ward off from its own property the damaging effects of the storm, yet in exercising that right it was bound to take care not to injure that of the plaintiffs."); 1 *Wood on Nuisances* 675 ("But a man has no right to do more than is necessary for his defense and to make improvements at the expense of his neighbor."). Inasmuch as it is clear that Defendants are entitled to construct shore defense structures on their own property, "it is equally clear that this right to deal with the [sea] and to control its current must be exercised with a just regard to the rights of others." *Crawford v. Rambo*, 7 N.E. 429, 431 (Ohio 1886); *see also* 1 *Wood on Nuisances* § 350 ("While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet they can only do this when it can be done without injury to others, either to an owner upon the opposite side of, or to those above or below him on the stream.").

This principle, that adjoining property owners cannot infringe on a neighbor's rights, is demonstrated in various similar contexts. For example, in

the apportionment of riparian rights,[3] one cannot increase one's rights at the expense of another. *Carr v. Kidd*, 540 S.E.2d 884, 891 (Va. 2001) (affirming rule that apportionment of riparian rights, which is based on the length of shore each riparian proprietor owns, is based on the natural shoreline regardless of any perimeter improvements). Likewise, a riparian owner cannot induce an artificial change in water boundaries if harm to other interests would occur. *Strom v. Sheldon*, 12 Wash. App. 66, 73 (1974). These cases all have in common the principle that a riparian owner cannot act in such a way as to cause an injury to a neighbor's rights. As in these cases, Defendants in the present case cannot abrogate their neighbors' right to an ambulatory boundary in favor of their own right to protect their property.[4]

In all, the court is persuaded that the mean high-water mark should be located at the point on the shore where it would be located but for the presence of Defendants' shore defense structures. If the mean high water mark were to be located on the shore defense structures, erosion would be effectively stopped and a very large benefit would accrue therein

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[3] Riparian rights include a riparian owner's right to erect structures up to the line of navigation.

[4] The court considers this obligation to avoid injury to be reciprocal. Inasmuch as Defendants must not act in a way to infringe Plaintiffs' right to an ambulatory boundary, Plaintiffs cannot be unreasonable in the exercise of their rights to the detriment of Defendants' rights.

to Defendants at the detriment of the United States and the Lummi Nation. Accordingly, the court holds that artificial structures that are not otherwise authorized do not arrest the landward movement of an ambulatory water boundary.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment [docket no. 161-1] is DENIED. The court holds that the tideland boundary is marked by the intersection of mean high water and the shore as it would be located but for the presence of artificial structures.

DATED at Seattle, Washington this 11th day of February, 2003.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809 ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION (Filed Jan. 13, 2003)
THE LUMMI NATION, Intervenor-Plaintiff.	

Before the court is Defendants' motion for clarification and reconsideration of this court's November 26, 2002 order, granting in part and denying in part Plaintiffs' motion to exclude testimony, limit discovery, and strike defenses. Specifically, Defendants ask the court to reconsider the relevance of the testimony of Defendants' expert, Jeffrey Layton, and if not, to at least clarify the scope to which Layton's testimony is excluded.

Under Local Rule 7(h), motions for reconsideration are disfavored and are ordinarily denied unless the moving party demonstrates "manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to [the

court's] attention earlier with reasonable diligence." LR 7(h). In the present motion, Defendants contend that the court committed error when it relied on an incomplete description of the applicable law of trespass in ruling that Layton's testimony was irrelevant to the trespass action. Defendants also suggest the court erred in relying on Washington law whereas federal law controls an action for trespass on Indian lands.

The parties have not briefed, and the court has not found, a substantive difference between federal and state law trespass. *Compare Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wash. App. 260, 281 (2001) (adopting Restatement), *with U.S. v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement). Both bodies of law rely heavily on the Restatement. Consequently, any error by the court in relying on Washington law is harmless at best.

Furthermore, the definition of trespass upon which the court relied was sufficiently complete to support the conclusion that Layton's testimony is not relevant.[1] Layton's testimony, as embodied in his report, answers the question of "[w]hat is the underlying cause (or causes) of the degradation of the beach berm that fronts the defendants' property?" Attach. 1, Johnson Decl. at 9 (Oct. 30, 2002). While it is true

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[1] The court defined trespass as occurring when a person "intentionally . . . remains on the land . . . or fails to remove from the land a thing which he is under a duty to remove."

that whether these changes are the result of erosion or avulsion is possibly relevant to this action, Layton's testimony expresses no opinion on the character of the changes. Layton Dep. at 116-17. Furthermore, contrary to Defendants' reading of *Georgia v. South Carolina*, 497 U.S. 376 (1990), the determinative set of facts in determining whether shoreline changes are avulsive or erosive is the rapidity of the changes and not whether they are man-made or natural. 497 U.S. at 403 ("The rapidity of some aspects of the dredging and other processes led the Special Master to conclude that the changes in the Savannah River were primarily avulsive in nature."). Layton's testimony does not address these issues and is therefore irrelevant.

Likewise, the definition employed by the court incorporated the concept cited by Defendants that they would not be liable if they are under no duty to remove the allegedly trespassing structures. Layton's testimony, however, does not address Defendants' duties. Inasmuch as the parties dispute whether Defendants have a duty to remove the shore defense structures, Layton's testimony only points to the fact that Defendants themselves have not caused the beachfront changes – a fact that is not disputed. Layton's testimony, therefore, contributes nothing to a determination of whether Defendants have any duty.

However, inasmuch as the court's prior order was unclear as to the scope to which Layton's testimony is

excluded, the court will clarify: Layton's report, attached to the October 10, 2002 Johnson Declaration, is excluded solely as it bears on the question of what has caused the beachfront changes on Sandy Point. Layton may still testify on other matters that establish the timing of the changes in the shoreline, the nature of the changes, and on other matters that are relevant.

DATED at Seattle, Washington this 10th day of January, 2002.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809R ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY, LIMIT DISCOVERY, AND STRIKE DEFENSES (Filed Nov. 26, 2002)
THE LUMMI NATION, Intervenor-Plaintiff.	

THIS MATTER comes before the court on the United States' and Lummi Nation's motion to exclude testimony, limit discovery, and strike affirmative defenses. Having reviewed the papers filed in support of and in opposition to this motion, the court finds and rules as follows:

I. BACKGROUND

This case is about rockeries and bulkheads that are alleged to trespass onto tidelands on Sandy Point, Washington to which the United States claims it

holds title in trust for the Lummi Indian Nation.[1] In answering the complaints, Defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, Harry F. Case, Ian C. and Marcia A. Boyd, and Donald C. and Gloria Walker (hereinafter "the Milners") collectively raise an affirmative defense denying that either the United States or Lummi Nation hold title to the property in dispute. As part of their defense, the Milners plan to offer the testimony of Jeffrey Layton, whose proposed testimony is that the changes in the tide lines fronting the Milners' properties have been caused by the construction of two deep-water piers to the north of the Milners' properties. The Milners have also propounded discovery seeking documents from the United States and Lummi Nation related to the construction, improvement, or maintenance of the two deep-water piers.

In response, the United States and Lummi Nation have moved the court to strike the Milners' affirmative defense, exclude Layton's testimony, and relieve them from the responsibility of responding to the Milners' discovery requests.

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[1] In addition to trespass, the complaints also allege violations of Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 and Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a).

II. DISCUSSION

A. Motion to strike affirmative defense

Under FRCP Rule 12(f), a court acting on its own initiative may strike an insufficient defense at any time. *U.S. v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1535 (E.D. Cal. 1992) (citing 5A C. Wright and A. Miller, *Federal Practice and Procedure* § 13080 (2d ed. 1990)). The court will consider Plaintiffs' motion even though the motion is untimely.[2] *Id.* Such a motion to strike is granted only if the affirmative defense is insufficient as a matter of law. *Id.* (citing *Memorex Corp. v. Int'l Bus. Mach. Corp*, 555 F.2d 1379 (9th Cir. 1977)).

1. Tidelands are held in trust

Plaintiffs argue that they maintain title to the tidelands in question. By treaty and executive order in 1855 and 1873, the United States reserved to the Lummi Nation land on Sandy Point to the low-water mark. Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855); Executive Order (Nov. 22, 1873), *reprinted in* 1 Kappler, *Laws and Treaties* 917 (Gov't Printing Office 1904). Under the doctrine first announced in *Pollard's Lessee v. Hunter*, 44 U.S. 212 (1845), such an express reservation precludes title in the tidelands in any other entity. *Shively v. Bowlby*, 152 U.S. 1, 58 (1894) (states take title to submerged and tidal lands upon

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[2] A motion to strike must be filed within 20 days of the service of an answer.

statehood subject to any express reservation by the United States or any prior grant of those lands). As Washington gained statehood in 1889, the land down to the low-water mark is held in trust by the United States on behalf of the Lummi Nation. *Id.*

2. Dispute of fact regarding boundaries

The Milners succeed to properties that were patented from the Lummi Reservation. These properties are bounded by the beach. The land along the beach, however, has not remained static. In the present case, a substantial amount of beachfront fronting the Milners' properties has been lost since 1962.[3] Through erosion, accretion, and avulsion,[4] the low- and high-water marks have changed over time. If the change is slow and imperceptible, as by erosion or accretion, the boundary lines shift. *Parker v. Farrell*, 74 Wash. 2d 553, 554-55 (1968). If, on the other hand, the change is avulsive, the original boundary lines remain. *Id.* at 555.

Plaintiffs contend that the change in the shoreline is due to erosion and that the property lines have accordingly shifted landward, leaving the Milners' rockeries and bulkheads on Lummi land. The Milners, on the other hand, allege that the

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[3] For example, on the Walker lot, the mean high water mark has moved landward 92 feet. Ex. 1, Stephens Decl. at 5.

[4] Avulsion is the sudden and rapid change in a shoreline. *Parker v. Farrell*, 74 Wash. 2d 553, 555 n.1 (1968).

changes were avulsive and that property lines have not changed so that the rockeries and bulkheads are still located on their land.

Without further proof of the nature of the change in the shoreline fronting the Milners' properties, it cannot be determined as a matter of law whether the rockeries and bulkheads are located on the Milners' property. This dispute of fact makes striking the affirmative defense inappropriate.

B. Motion to exclude Layton's testimony

Under FRE 401, only relevant evidence is admissible. Under that rule, relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

In the present case, the moving parties have sued for trespass. Under Washington law, a person trespasses "when he or she 'intentionally . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove.'" *Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wash. App. 260, 281 (quoting *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 681-82 (1985)). Consequently, Layton's testimony about the cause of the loss of beachfront that allegedly resulted in the Milners' structures being outside their property lines is irrelevant as it does not establish whether the Milners' are in fact trespassing. Moreover, the cause of the

beachfront loss is also irrelevant to a determination of whether that loss resulted from erosion or an avulsion as the determining factors are the speed and rapidity of the change, not whether the change was manmade or natural. *Compare In re Point Lookout*, 144 N.Y.S.2d 440 (1954) (loss of 30 feet of beach due to seawall is avulsive), *with, City of New York v. Realty Assoc.*, 256 N.Y. 217 (1931) (storms washing away beach are avulsive). Nor is the cause of the beachfront loss relevant to the amount of damages arising *from the trespass*. Simply put, evidence about the cause of the erosion has no tendency to make any fact that is of consequence to the determination of the action more or less likely.

At this stage, Defendants' have failed to demonstrate the relevance of Layton's testimony. Accordingly, the testimony is excluded. Should the testimony become relevant at some future point, Defendants' can seek the court's permission to admit the testimony.

C. Motion to limit discovery

FRCP Rule 26(c) allows a party to move for a protective order that discovery not be had where justice requires that the party be protected from "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). Though not styled as such, the court interprets the moving parties' motion to limit discovery as a motion for a protective order.

Having reviewed the declaration of Brian Kipnis, the court finds that the parties have not adequately conferred as required by FRCP 26(c). The court, therefore, orders that the parties meet and confer to determine whether production of the administrative record accompanying any permitting decisions for the two piers is sufficient or whether the parties can agree on other limitations that will resolve this dispute.

III. CONCLUSION

For the foregoing reasons, the United States' and Lummi Nation's motion [docket no. 92-1] is GRANTED in part and DENIED in part. It is hereby ORDERED that

1. Jeffrey Layton's proposed testimony be excluded;
2. the parties should meet and confer regarding the Milners' requests for production number 3 and 4 in Defendants' second set of requests for production; and
3. the parties should contact Elizabeth Tyree at (206) 553-2996 to set a status conference regarding possibly bifurcating the case to handle the boundary dispute separate from any issue of damages.

DATED at Seattle, Washington this 26th day of November, 2002.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants. THE LUMMI NATION, Intervenor-Plaintiff.	NO. C01-809R ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND STRIKING AS MOOT LUMMI NATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Filed Dec. 19, 2002)

THIS MATTER comes before the court on Defendants' motion for summary judgment and on Plaintiff in Intervention Lummi Nation's motion for partial summary judgment. Having reviewed the papers filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

The facts of this case were recently set forth in the court's December 16, 2002 order. Before the court is a motion for summary judgment by defendants Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, Ian C. and Marcia A.

Boyd, and Donald C. and Gloria Walker (hereinafter, collectively as the "Defendants").[1] Additionally, before the court is a motion for partial summary judgment by the Lummi Nation on the laches, estoppel, waiver, and non-ownership defenses raised by all the defendants in the case.

II. DISCUSSION

A. Lummi Nation's motion

The Lummi Nation has moved for partial summary judgment as to the defenses to trespass raised by Defendants including laches, estoppel, waiver, and non-ownership. The court ruled on the non-ownership defense in its order dated December 16, 2002. Laches, estoppel, and waiver are not applicable in a suit by the United States seeking to vindicate the Lummi Nation's rights. *Bd. of Comm'rs v. U.S.*, 308 U.S. 343, 350-51 (1939); *U.S. v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (affirming district court's rejection of equitable defenses where tribe asserted rights 135 years after entering into a treaty); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) ("laches or estoppel is not available to defeat Indian treaty rights"). But since Defendants have withdrawn these defenses, the Lummi Nation's motion is stricken as moot.

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[1] Defendant Harry F. Case did not join in this motion.

B. Defendants' motion

Defendants have moved for summary judgment on all of the government's claims. In addition to the defense of non-ownership, Defendants raise the defenses to the trespass claim that they have the right to encroach on the tidelands and that the government cannot establish the intent and causation elements of trespass. As to the regulatory violations, Defendants claim that their actions are lawful under nationwide permits and that the government has no jurisdiction.

1. Right to encroach

Defendants contend that regardless of ownership, they have a right to "wharf out" that entitles them to maintain the shore defense structures on the tidelands. It is well settled that a riparian owner has a right of *access* from the front of his land to the navigable part of a stream, such that when not forbidden by public law, he may construct landings, wharves, or piers for the purpose of enhancing access. *U.S. v. River Rouge Improvement Co.,* 269 U.S. 411, 418 (1926).

Defendants fail to cite any case law that extends this right to "wharf out" to the construction of bulkheads and riprap. In fact, courts have held the exact opposite – that the construction of such structures is *not* within this right. *See, e.g., U.S. v. 62.61 Acres of Land,* 547 F.2d 818, 820 (4th Cir. 1977) (a stone jetty used solely for stream navigation and current deflection is not within the right to "wharf out");

Confederated Salish and Kootenai Tribes v. Namen, 380 F. Supp. 452, 467 (D.C. Mont. 1974) (finding a dispute of fact whether a building and landfill extending into a lake exceed the limits of the right to wharf out).

2. Intent and causation for trespass

Defendants contend that they cannot be liable for trespass because they never intended to trespass. Under the Restatement of Torts,[2] a person trespasses when he "intentionally . . . remains on the land or . . . fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) OF TORTS § 158; *see also Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wash. App. 260, 281 (quoting *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 681-82 (1985)). "In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made." *New York State Energy Research and Dev. Auth. v. Nuclear Fuel*

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[2] Inasmuch as there is a federal common law trespass cause of action to protect Indian lands, *see U.S. v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994), federal common law seems to abide by the Restatement. *See U.S. v. West*, 232 F.2d 694, 699 (9th Cir. 1956) (adopting Restatement (First) of Torts for operative definition of federal trespass); *U.S. v. Osterlund*, 505 F. Supp. 165, 167 (D.C. Colo. 1981) (adopting Restatement (Second) of Torts).

Services, Inc., 561 F. Supp. 954, 974 (W.D.N.Y. 1983) (citing RESTATEMENT (SECOND) TORTS §§ 158, 160).

Given that the government has made a demand to remove the shore defense structures, Defendants would have the requisite intent if the structures are on the government's land. As there is a dispute of fact as to whether that is the case, it is impossible to state at this juncture whether Defendants do or do not have the intent to trespass.

Defendants also contend that since it was the shifting beach that has caused the shore defense structures to be located on the tidelands, they cannot be liable for trespass. Defendants liken their situation to one raised in an illustration to the Restatement: if a tornado picks up and drops a house onto someone else's land, the owner of the house is not liable for trespass. RESTATEMENT (SECOND) TORTS § 158, ill. 1.

Defendants have not sat idly while the shifting beach caused a trespass. Rather, they have continually augmented the riprap and bulkheads. Given the shifting boundary, it is possible that Defendants deposited rock on the tidelands causing a trespass. Because there is a question of fact as to the location of the boundary lines at all relevant times when Defendants augmented the bulkheads and riprap, there is a question of fact as to whether Defendants have caused a trespass. Summary judgment is therefore not appropriate.

C. Regulatory violations

1. Nationwide permits

Defendants contend that at all times their actions in supplementing the shore defense structures were authorized by two nationwide permits,[3] one for the repair, rehabilitation, or replacement of previously authorized, currently serviceable structures, and one for bank stabilization. 33 C.F.R. § 330.5(a)(3), (a)(13) (1982).

As a prerequisite for a nationwide permit, all applicable relevant conditions must be met. 33 C.F.R. § 330.1. Defendants fail to demonstrate that they have complied with all of the relevant conditions. One condition is that heavy equipment working on the tidelands should be placed on mats. 33 C.F.R. § 330.6(a)(6). In the present case, at least one defendant used such heavy equipment without mats to return rocks that had slipped seaward from the riprap. The court finds that there is a genuine dispute of fact as to whether Defendants have complied with the applicable relevant conditions and therefore, whether the nationwide permits apply.

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[3] A nationwide permit is a general permit issued by the Chief of Engineers of the Army Corps of Engineers to satisfy the requirements of both Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. 33 C.F.R. § 330.1 (1982). Since 1982, the year that marks the beginning of Defendants' actions, the nationwide permits at issue in the present case have only changed slightly in ways that do not affect this case.

2. Federal jurisdiction

Defendants contend that all of their actions were conducted outside federal jurisdiction. Federal regulatory jurisdiction under the Rivers and Harbors Act ("RHA") extends seaward from MHW. Under the Clean Water Act ("CWA"), federal regulatory jurisdiction extends landward up to mean higher high water ("MHHW").

a. Rivers and Harbors Act

Under the RHA, the United States has extensive authority to seek an injunction to remove obstructions that may have been legally constructed. *United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161, 1167 (9th Cir. 2000); *see also United States v. Alameda Gateway, Ltd.*, 953 F. Supp. 1106, 1111 (N.D. Cal. 1996) ("deem[ing] the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in maintaining unimpeded access to the navigable waters of the United States.").

In the present case, it is undisputed that at the time of the government's last survey, rock and riprap extend seaward beyond the MHW line. Stephens Decl. ¶ 8. It is irrelevant whether the riprap was originally placed above MHW for the purposes of the government's RHA claim. The presence of these obstructions below MHW at this time is sufficient to trigger federal jurisdiction.

b. Clean Water Act

In its complaint, the United States alleges that Defendants violated section 404 of the CWA by "placing or allowing fill material to be placed in waters of the United States." Compl. ¶ 18. The United States also alleges that the Defendants are in violation of Section 301, which prohibits the discharge of a pollutant without a permit. Compl. ¶ 19. Defendants respond that because all of the shore defense structures were originally placed above MHHW, there can be no CWA violation.

It is undisputed that rock and riprap currently extend seaward beyond MHHW. Stephens Decl. ¶ 8. In fact, rocks from the riprap continually fall seaward, sometimes coming to rest well beyond MHHW. Bennett Decl. ¶ 8 ("When rocks from our property had moved down to the beach, we would move them back."). Whether the fill material composing the bulkhead and riprap runs off and disperses into the water is disputed by the parties, making resolution of the alleged CWA violations inappropriate for summary judgment.

Lastly, Defendants contend that they did not violate section 404 given the exemption in the CWA for "maintenance . . . of currently serviceable structures such as . . . riprap." 33 U.S.C. § 1344(f)(1)(B). Whether Defendants' additions and expansion of the original shore defense structures qualify as maintenance is a question of fact inappropriate for resolution on summary judgment.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment [docket no. 95-1] is DENIED. The Lummi Nation's motion for partial summary judgment [docket no. 108-1] is STRICKEN.

DATED at Seattle, Washington this 19th day of December, 2002.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KEITH E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809R ORDER GRANTING UNITED STATES' AND HARRY F. CASES'S [sic] MOTIONS FOR PARTIAL SUMMARY JUDGMENT (Filed Dec. 16, 2002)
THE LUMMI NATION, Intervenor-Plaintiff.	

THIS MATTER comes before the court on the United States' and Harry F. Case's motions for partial summary judgment. Having reviewed the papers filed in support of and in opposition to these motions, the court finds and rules as follows:

I. BACKGROUND

The defendants in this case, Keith E. and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K. Nicholson, Harry F. Case, Ian C. and Marcia A. Boyd, and Donald C. and Gloria Walker (hereinafter, collectively as the "Defendants") own property on Sandy

Point in Whatcom County, Washington, along the Gulf of Georgia. Each of these properties is protected by shore defense structures, including bulkheads fronted by riprap.[1] In 1982, a major storm caused severe erosion of the beach. Since then, defendants Sharp, Nicholson, Bennett, and Walker have supplemented their shore defense structures.

In its complaint, the United States alleges that these shore defense structures trespass onto tidelands on Sandy Point to which the United States claims title for the Lummi Nation. In addition to trespass, the complaint also alleges violations of Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (placing an obstruction in a navigable water), and Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a) (discharging of dredged and fill material or pollution without a permit).

Before the court are two motions filed by the parties. The United States has moved for partial summary judgment on the issue of ownership of the tidelands. Defendant Harry E. Case has moved for partial summary judgment on the issue of whether the tide-lands extend to mean high water or to the line of vegetation. The court will consider each motion in turn.

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[1] Riprap is a collection of large rocks seaward of the bulkheads.

II. DISCUSSION

In 1855, the Point Elliot Treaty created the Lummi Indian Reservation. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. In 1873, pursuant to the authority vested in him by the treaty, President Grant reserved land on Sandy Point to the low-water mark on behalf of the Lummi Nation. Executive Order (Nov. 22, 1873), *reprinted in* 1 Kappler, *Laws and Treaties* 917 (Gov't Printing Office 1904). According to the treaty, this land could be surveyed into lots and patented by members of the tribe. Treaty of Point Elliot at art. 7. In 1873 and 1883, the land in the reservation was surveyed and divided into lots. In 1906, Henry Finkbonner received a patent to Lot 1 of Section 16 in Township 38 North, Range 1 East. In 1907, Frank Finkbonner received a patent to Lot 1 in Section 17, Township 38 North, Range 1 East. These lots were subsequently purchased and subdivided. Defendants are successors in interest to parcels derived from these original patents.

A. Tideland ownership

The United States has moved for partial summary judgment on the issue of tideland ownership. The government argues that it has title to the tidelands in question. Defendants counter that title to the tidelands passed to the state of Washington upon statehood.

Longstanding precedent in the Ninth Circuit has held that the tidelands in the Lummi Reservation are

held by the United States on behalf of the Lummi Nation. For instance, in *United States v. Stotts*, 49 F.2d 619 (W.D. Wash. 1930), the district court quieted title in the tidelands on the Lummi Reservation in favor of the United States. 49 F.2d at 620-21. In *Stotts*, the state of Washington sold off tidelands in the Lummi Reservation. When the United States sued to quiet title in those properties, the court held that the United States had acted in accordance with the interests of the Indians and made a reservation of the tidelands such that title was held in the United States in trust for the Lummi Nation. *Id.*; *see also United States v. Romaine*, 255 F. 253, 259 (9th Cir. 1919) (title to tidelands on the Lummi Reservation in the United States).

Defendants contend, however, that this precedent is flawed because the prior decisions did not consider whether President Grant's reservation was sufficient to defeat the principle that title to submerged lands passes to a state upon entry into the Union. *See Pollard's Lessee v. Hunter*, 44 U.S. 212 (1845) (under "equal footing" doctrine, new states admitted to the Union succeed to the United States' title to submerged lands). Defendants fail, however, to persuade this court that such longstanding precedent and expectations should now be overturned.

First, "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). The doctrine of *stare*

decisis applies with special force to decisions that affect title to land. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977); *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982). As the Supreme Court has stated, "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open." *Minnesota Mining Co. v. Nat'l Mining Co.*, 70 U.S. 332, 334 (1865).

Next, the prior decisions are correct under the doctrine that an executive reservation of submerged lands defeats a future state's title if the reservation "clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Idaho v. U.S.*, 533 U.S. 262, 273 (2001) (citing *U.S. v. Alaska*, 521 U.S. 1, 41-46, 55-61 (1997). In the present case, the 1873 Executive Order clearly reserves the land along the shores of Sandy Point down to the low-water mark.[2] Under the treaty, that reservation served to

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[2] In relevant part, the Order states:

> It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians . . . thence west along said township line to the *low-water mark* on the shore of the Gulf of Georgia.

Executive Order (Nov. 22, 1873), *reprinted in* 1 Kappler, *Laws and Treaties* 917 (Gov't Printing Office 1904) (emphasis added).

provide subsistence to the Lummi. *Stotts*, 49 F.2d at 620-21 (taking judicial notice that the Lummi subsisted on hunting and fishing and that "the tidelands were a necessary perquisite to the enjoyment of fishing"). Furthermore, Congress was aware of the extent of that reservation. *See* Report of the Secretary of the Interior, Exec. Doc. 1, Pt. 5, 46th Cong., 2d Sess. at 264 (1879) (map displaying reservation boundary and citing the 1873 executive order). The court concludes that since Congress did not rescind the reservation of the tidelands despite this notice, Congress intended to defeat state title. *Idaho v. U.S.*, 533 U.S. 262, 274 (2001) (it is sufficient for Congress to be on notice that a reservation includes submerged lands and that the purpose of the reservation would be compromised if the submerged lands passed to the state).

In sum, then, Defendants do not provide any reason for this court to upset over 70 years of precedent. The government's motion is GRANTED.

B. Tideland boundary

Harry F. Case has moved for partial summary judgment as to the landward boundary of the tidelands. Case contends that that boundary is mean high water ("MHW") and not the line of vegetation as

claimed by the Lummi Nation.[3] Mean high water or mean high tide is the average elevation of all tides as observed at a location through a complete tidal cycle of 18.6 years. *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935).

A question "as to the extent of [a] federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question." *Borax*, 296 U.S. at 22; *see also Wilson v. Howard*, 5 Wash. App. 169, 180 (1971) (applying federal law to determine high-water mark and boundary of federally patented land). In *United States v. Boynton*, 53 F.2d 297, 298 (9th Cir. 1931), the Ninth Circuit held that the seaward boundary of the lots patented by Lummi tribal members was the high-tide line as then located. 53 F.2d at 298. The "general rule . . . is that patents of the United States to lands bordering [tidelands], in the absence of special circumstances, convey only to the high water mark." *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942). In light of *Boynton*, therefore, the seaward boundary of the present properties is the high-water mark. *Boynton*, 53 F.2d at 298.

Furthermore, in the case of tidal waters, "the high-water mark means the line of high water

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[3] In its Complaint in Intervention, the Lummi Nation defines the tidelands in question as all lands between the low-water mark and the line of vegetation. Lummi Compl. ¶ 13.

determined by the course of the tides, not as determined by physical markings made upon the ground by the water."[4] *U.S. v. Washington*, 294 F.2d 830, 834 (9th Cir. 1961). Since the properties in question were patented under federal law, it is irrelevant that the state of Washington defines the high-water mark as the line of vegetation. *Borax*, 296 U.S. at 22; *see Harkins v. Del Pozzi*, 50 Wash. 2d 237, 240 (1957) ("The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes."). Consequently, the seaward boundary of the patented properties (and conversely the landward boundary of the tidelands) is mean high water. Defendant Harry F. Case's motion is GRANTED.

III. CONCLUSION

For the foregoing reasons, the United States' motion [docket no. 117-1] and Harry F. Case's motion [docket no. 90-1] are GRANTED.

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[4] In contrast, the line of vegetation is used to mark high water only on rivers, streams, and other nontidal waters that have "no absolute ascertainable level because of variations of flow from a multitude of causes." *U.S. v. Washington*, 294 F.2d 830, 834 (9th Cir. 1961).

DATED at Seattle, Washington this 16th day of December, 2002.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, Plaintiff, v. KIETH [sic] E. MILNER and SHIRLEY A. MILNER, et al., Defendants.	NO. C01-809R ORDER DENYING DEFENDANT MILNER'S MOTION FOR SUMMARY JUDGMENT
THE LUMMI NATION, Intervenor-Plaintiff.	

THIS MATTER comes before the court on Defendants' motion for partial summary judgment. Having reviewed the papers filed in support of and in opposition to this motion, the court finds and rules as follows:

I. BACKGROUND

In 1999, Keith and Shirley Milner purchased property on Sandy Point Peninsula on the Lummi Indian Reservation. Shore defense structures, including a bulkhead and riprap, project from the westerly portion of the Milners' property and extend seaward. It is undisputed that the structures existed

prior to the Milners' purchase, and that the Milners have not placed, or authorized anyone else to place, materials on the bulkhead and riprap since.

The United States filed a civil action against the Milners under the Rivers and Harbors Act ("RHA"), the Clean Water Act ("CWA"), and for trespass seeking a permanent injunction ordering the Milners to remove the structures as well as civil penalties. The Milners have filed for partial summary judgment on the basis that they cannot be liable under the RHA and CWA because they did not construct the shore defense structures.

II. DISCUSSION

A. Rivers and Harbors Act of 1899

Section 10 of the Rivers and Harbors Act ("RHA") makes it unlawful "to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in . . . [a] water of the United States" unless authorized by the Army Corps of Engineers. 33 U.S.C. § 403. Section 10 is enforced through Section 12, which provides for criminal penalties. 33 U.S.C. § 406. Section 12 also provides for "the removal of any structures or parts of structures erected in violation of [Section 10] . . by the injunction of any district court exercising jurisdiction in any district in which such structures may exist." *Id.*

In the present case, the United States is seeking such an injunction ordering the Milners to remove the bulkhead and riprap. The Milners respond that they cannot be enjoined to do so because they did not erect the offending bulkhead and riprap and, therefore, never violated Section 10. Defendants' argument, however, is unpersuasive.

Under the RHA, the United States has extensive authority to seek an injunction to remove obstructions. The RHA was enacted to preserve and protect the country's navigable waterways and the Act must be read broadly, with full consideration of the public purposes to be served. *United States v. Republic Steel,* 362 U.S. 482, 491 (1960) ("We read the 1899 Act charitably in light of the purpose to be served."). In *United States v. Alameda Gateway, Ltd.,* 213 F.3d 1161 (9th Cir. 2000), the Army Corps of Engineers sued the current owners of a pier to recover costs associated with the removal of portions of two piers. The piers had been lawfully constructed by an earlier owner. The Corps sought to have portions of the piers removed because a change in the harbor line caused the piers to be obstructions. The Ninth Circuit held that the Corps could recover against the defendants, even though the defendants did not construct the piers. *Alameda Gateway,* 213 F.3d at 1167; *see also United States v. Alameda Gateway, Ltd.,* 953 F. Supp. 1106, 1111 (N.D. Cal. 1996) ("*Gateway I*") ("deem[ing] the RHA inapplicable to pre-existing structures would sharply restrict the ability of the government to preserve the public interest in

maintaining unimpeded access to the navigable waters of the United States.").

Defendants' attempts to distinguish *Alameda Gateway* are unavailing.[1] Defendants' attempts to introduce intent as a requisite element in the government's cause of action are likewise unavailing.[2] In light of the holding in Alameda Gateway, this court holds that, under the RHA, Defendants can be ordered to remove the bulkhead and riprap. Accordingly, Defendants' motion for summary judgment is denied.

B. Clean Water Act

Section 301 of the Clean Water Act ("CWA") makes unlawful "the discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311.

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[1] The Milners attempt to distinguish *Alameda Gateway* by pointing out 1) that in *Alameda Gateway*, the government was seeking reimbursement for the removal of the obstruction; 2) that in *Alameda Gateway*, defendant was a commercial enterprise whereas the Milners are private citizens; and 3) that in *Alameda Gateway*, the piers became obstructions as a result of congressionally mandated harbor improvements whereas in the present case, no such congressional action has occurred. Defs.' Repy at 7-8.

[2] For instance, Defendants cite *U.S. v. Ohio Barge Lines, Inc.*, 607 F.2d 624 (3d Cir. 1979) and *United States v. Bigan*, 274 F.2d 729 (3d Cir. 1960) for the proposition that Section 12 requires some intent and active contribution to the erection of the obstruction. These cases, however, are distinguishable and are unpersuasive in light of the recent Ninth Circuit decision in *Alameda Gateway*.

Under Section 404 of the CWA, the Army Corps of Engineers can issue permits for the discharge of dredge and fill material. 33 U.S.C. § 1344. Under Section 402, the Administrator of the EPA can issue permits for the discharge of any other pollutant. In its complaint, the United States alleges that the Milners violated section 404 by "placing or allowing fill material to be placed in waters of the United States." Compl. ¶ 18. The United States also alleges that the Defendants are in violation of Section 301. Compl. ¶ 19. The Milners argue, however, that they cannot be liable under the CWA because they never placed any of the fill materials in question. The Milners are partially correct.

Section 404 prohibits the discharge of dredge and fill material without a permit. In *Froebel v. Meyer,* 217 F.3d 928 (7th Cir. 2000), the court held that a Section 404 permit "is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever." 217 F.3d at 938. In *Froebel,* plaintiff sued Waukesha County, which owned land on which a breached dam was located. The breach, created by the state of Wisconsin and not by Waukesha County, caused the deposit of sediment downstream from the breach. In dismissing Froebel's claim against the County, the court held that "Section 404, its underlying regulations, and cases applying its terms all have a common element . . . [of] active conduct that results in the discharge of dredged or fill material." *Id.* at 939. In *Froebel,* the lack of any action by the County to discharge dredged or fill

material proved fatal to a Section 404 cause of action. Consequently, the Milners cannot be held liable under Section 404 given the undisputed evidence that they never placed any fill material into a water of the United States.[3]

However, in the instant case, there is a dispute as to whether the fill material composing the bulkhead and riprap remain inert or whether the material runs off and disperses into adjacent water. If such run off or dispersion occurs, then the Milners may be liable for violation of Section 301 by allowing a discharge of a pollutant without an appropriate permit. Whether such runoff and/or dispersion is occurring cannot be determined on the record before the court. Accordingly, summary judgment must be denied.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment [docket no. 78-1] is DENIED.

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[3] Cases cited by the government for the proposition that one is liable for the continuing presence of dredged or fill material are all distinguishable in that, in those cases, the defendant was the party that originally discharged the dredged or fill material. In the present case, it is undisputed that the Milners did no such thing.

DATED at Seattle, Washington this 3rd day of October, 2002.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

33 U.S.C. Section 403

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. Section 406

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be

punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. Section 407

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or

by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.